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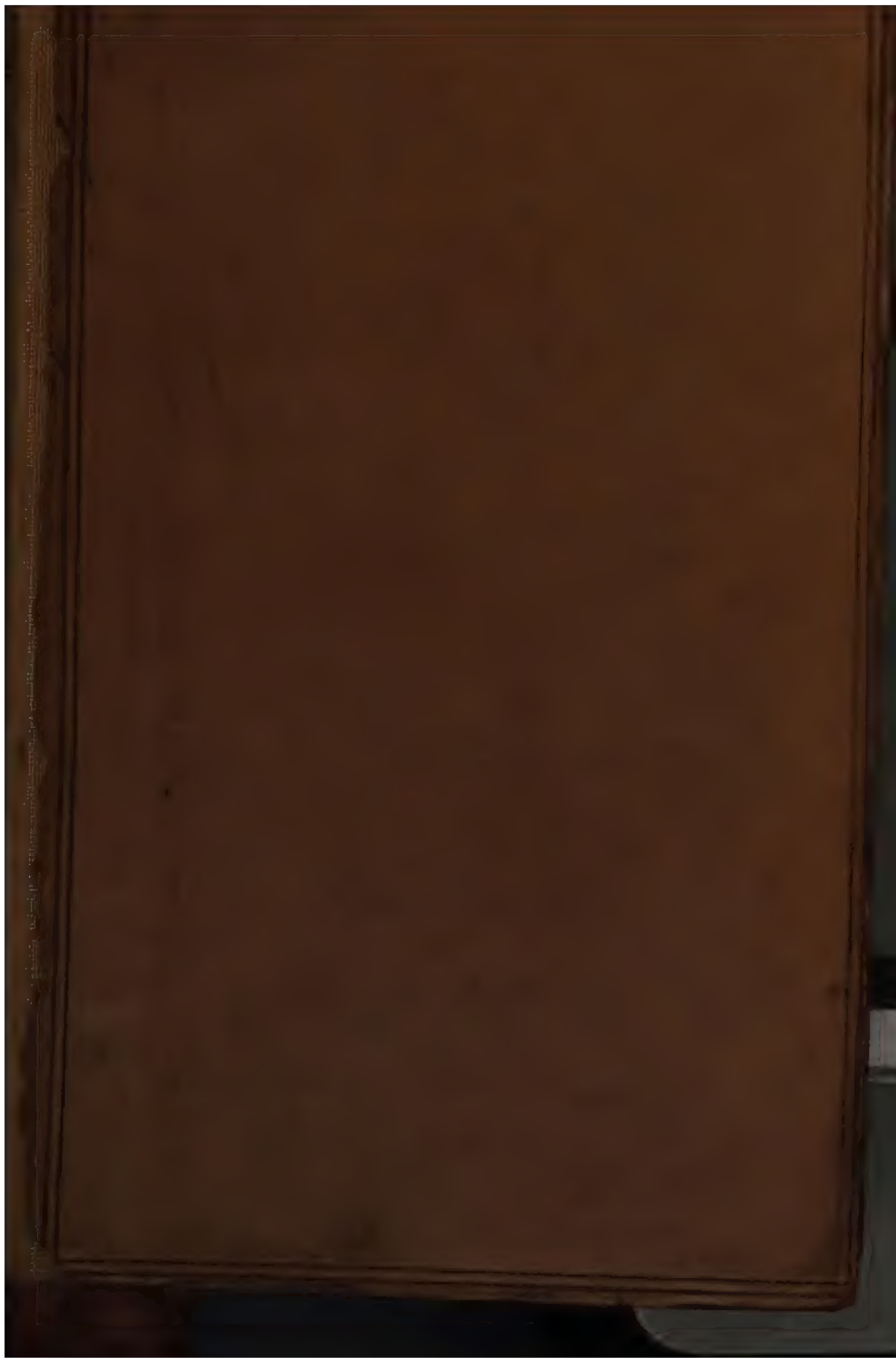
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REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

BY THE

RIGHT HON. SIR J. L. KNIGHT BRUCE,
VICE-CHANCELLOR.

BY

JOHN COLLYER, OF LINCOLN'S INN, ESQ.,

BARRISTER AT LAW.



VOL. I:

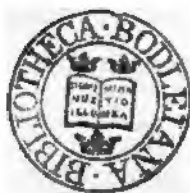
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Lord Chancellor . . LORD LYNDBURST.

Master of the Rolls . LORD LANGDALE.

Vice-Chancellor of England . } SIR LANCELOT SHADWELL.

Vice-Chancellors . { SIR JAMES L. KNIGHT BRUCE.
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Attorneys-General . { SIR FREDERICK POLLOCK.
SIR WILLIAM WEBB FOLLETT.

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SIR FREDERIC THESIGER.

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ERRATA.

In page 223, in the note, *for* “ p. 312 ” *read* “ p. 212.”

In page 434, in the note, *for* “ will ” *read* “ bill.”

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

COMMENCING IN

HILARY TERM, 7 VICT., 1844.

1844.

Jan. 13th.

REID *v.* TERRITT.

THE bill was filed by simple contract creditors against the executors and devisees of a testator, (some of whom were infants), for the administration of his real and personal estate.

Previously to the institution of this suit, a suit of “Goodchild *v.* Territt” had been instituted by other creditors against the same parties; and in that suit, which was heard before another branch of the Court, the usual decree was made for an account of the testator’s debts and personal estate, and for an inquiry as to his real estate. The debt, however, of the plaintiff in that cause, being admitted by the executrix, had not been proved against the infant defendants, nor did the decree contain any direction to the Master to make the usual preliminary inquiries as to parties: and a motion which was made in that suit, to restrain the plaintiffs in the present suit from prosecuting it, had been refused, on the ground of the irregularity of the decree in that suit. No report had been made in the former suit.

Two successive creditors’ suits having been instituted against the same executrix, the latter suit was permitted to go on, notwithstanding a decree had been made in the former suit; the decree having been obtained without sufficient proof of the debt, and being also irregular in form.

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REID
v.
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The debt of the plaintiffs in the present suit having been regularly proved, and the cause now coming on to be heard, the plaintiffs asked for the usual decree, and that the cause might be referred to the same Master to whom the cause of “Goodchild v. Territt” stood referred, with liberty for him to adopt the accounts taken in that suit.

Mr. *Russell* and Mr. *Lloyd*, for the plaintiffs.

Mr. *Rasch*, *contrà*, contended that the irregularity of the decree in the former suit was not a ground for superseding that suit in favour of the present : *Calvert v. Godfrey* (a).

The VICE-CHANCELLOR, after observing that the case of *Calvert v. Godfrey* seemed to have been special in its circumstances, said, that, as the plaintiffs’ debt in “Goodchild v. Territt” had not been proved, he thought that the plaintiffs in the present suit were entitled to the usual decree, with an addition, that it should be without prejudice to any application which might be made to consolidate the two suits, or stay the proceedings in either. His Honor also said that the want of a direction for inquiry as to parties in the former suit was an additional reason for making the decree in this form.

(a) 12 Law Journ., N. S., Chanc., 305.

1844.

Jan. 17th.

GRACE v. TERRINGTON.

JAMES NICKLIN by his will gave, devised, and bequeathed his copyhold messuage or dwelling-house therein mentioned, and all his personal estate, to his executors and trustees therein named, upon trust for his daughter Ann Capper for her life, and after her decease, upon trust for the benefit of the children of Ann Capper as therein mentioned; and if there should be no child of his said daughter, or being any, they should all die under the age of twenty-one years, then he directed that his said trustees and the survivors and survivor of them, and the executors or administrators of such survivor, should, according to their respective rights, stand and be possessed of the said trust property, both real and personal, and the securities whereon the same might be invested (except the sum of £2000) in trust *for such person or persons of the blood and kindred of the said Ann Capper*, living at the time of her decease, in such shares and proportions, manner and form, as the said Ann Capper, notwithstanding her coverture, by her last will or any testamentary writing, to be by her signed, sealed, and published in the presence of and attested by two or more credible witnesses, should direct or appoint; and in default of such direction or appointment, and subject thereto, in trust for such person or persons of the blood and kindred of the said Ann Capper, living at the time of her decease, as would, by virtue of the statute of distribution of intestates' effects, have become entitled to the said Ann Capper's personal estate in case she had died unmarried and intestate, and in the same shares as he, she, or they would in that case have become entitled to the same. And as to the said sum of £2000, part of his said personal estate, from and after the decease of the said Ann Capper, he did thereby will and direct that the same should be in trust for such person or persons indiscriminately and without distinction, and to

Upon a bill filed for the purpose of obtaining a declaration of the rights of the appointees of a personal fund, under a will executed in pursuance of a power of appointment:—*Held*, that the party interested in default of appointment was a necessary party to the suit.

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TERRINGTON.

and for such intents and purposes, and under and subject to such powers, provisoes, and declarations, as the said Ann Capper, notwithstanding her coverture, by her last will or any testamentary writing, to be by her signed, sealed, and published, as before mentioned, should direct or appoint; and in default of such direction or appointment, in trust for such person or persons of the blood and kindred of said Ann Capper, living at the time of her decease, as would, by virtue of the statute of distribution of intestates' effects, have become entitled to her said personal estate in case she had died unmarried and intestate, and in the same shares as he, she, or they would in that case have become entitled to the same.

After the death of the testator, Ann Capper filed her bill against W. Terrington, the surviving trustee and executor under the will, and against Edward Hanson and others, as her next of kin, praying accounts of the outstanding personal estate of the testator, and of what had been received by Terrington, and that he might be discharged from his office of trustee, and that new trustees might be appointed, and for a receiver of the rents of the copyhold estate. In that suit a decree was made and various proceedings were had, and a considerable sum of money was paid into Court, and Terrington, who had become embarrassed in his circumstances, and had wasted the trust fund was discharged from his trusteeship, and two persons named Grace and Slye were appointed trustees in his room. These persons afterwards were brought before the Court as defendants to a supplemental bill filed against them by Ann Capper.

Ann Capper afterwards died without ever having had any children. By her will and certain codicils duly executed in pursuance of her power, she appointed the £2000 mentioned in the will of her father to the children of her late husband James Capper; and after reciting her desire to appoint the residue of her father's estate in favour of

her blood and kindred, she appointed various sums forming part of that residue to numerous legatees (a) named in the will, and directed the trustees of her father's will to transfer, assign, and pay all such parts of the residue as were not wanted for the payment of the said legacies to the children of her kinsman Benjamin Hanson.

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TERRINGTON.

At the death of Ann Capper, Edward Hanson, who was not a child of Benjamin Hanson, was the only person of her blood and kindred who, by virtue of the Statute of Distributions, would have been entitled to her personal estate in case she had died intestate and unmarried.

The present bill was filed by Grace and Slye against Terrington, the executors of Ann Capper, and the children of Benjamin Hanson. After alleging that Ann Capper had not waived all the interest and dividends to which she was entitled under her father's will, and that her executors had not filed a bill of revivor, the bill prayed that the suits might be revived, and the rights of all parties interested might be declared, and all proper accounts taken.

Upon the cause now coming on for hearing, the *Vice-Chancellor* noticed that Edward Hanson was not a party to the suit.

Mr. *E. F. Smith*, for the plaintiff, contended that it was not necessary to make him a party.

Mr. *Follett* and Mr. *Phillips* appeared for the defendants.

THE VICE-CHANCELLOR.—The Court, being in possession of a fund over which there is a power of appointment, is asked to say, upon the evidence, that the power was well executed, in the absence of the party interested in contesting the validity of its execution. The tenant for life had power to appoint the fund to class A., and in default

(a) *Manning v. Thessiger*, 1 S. & S. 106.

1844.

GRACE

v.

TERRINGTON.

of appointment it was to go to class B.; and class B. is not here. A decree in the absence of the person representing that class would be erroneous. The bill must be amended by making him a party. If he shall appear and consent to be bound by the proceedings, his answer may be dispensed with.

Jan. 17th.

BOOTH v. VICARS.

A testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B., to be equally divided between them, share and share alike, if then living; but, if dead, to go and be equally divided to and amongst the respective next legal representatives of A. and B., share and share alike. A. and B. died in the lifetime of the testator's widow:—*Held*, that the next of kin of A. and B., according to the Statute of Distributions, living at the death of the testator's widow, were entitled to the fund *per stirpes*.

RICHARD VICARS, by his will, after directing the payment of his just debts, legacies, and funeral expenses, and devising his real estate to his wife, Sarah Vicars, for her life, and after her decease to Nicholas Vicars and Mary Brown, the wife of James Brown, and making several specific and pecuniary bequests, gave and bequeathed all the rest and residue of his personal estate and effects to trustees, upon trust, that they should, as soon as might be after his decease, sell and dispose of such parts thereof as should not at his death consist of ready money, and should collect, receive, and get in all debts due and owing to him, and should place or put out the monies which should arise by such sale or sales, and which should be received and gotten in as aforesaid, and also his ready money, upon such good and sufficient security or securities at interest, as to them his said trustees should seem meet, and should stand and be possessed of the said residue and securities upon trust to pay the interest, dividends, and annual produce thereof unto his the testator's wife for her life, for her sole and separate use. "And from and after the decease of my said wife, then upon this further trust, and my will is, that the residue of my goods, chattels, stock in trade, personal

estate and effects, and the securities whereon or upon which the same or any part or parts thereof shall or may be vested or placed, shall by them, my said trustees or the survivor of them, or the executors or administrators of such survivor, be assigned to and go and be paid unto and to the use of the said Nicholas Vicars and Mary Brown, the wife of the said James Brown, to be equally divided between them, share and share alike, if then living ; but, if dead, to go and be equally divided to and amongst *the respective next legal representatives* of the said Nicholas Vicars and Mary Brown, share and share alike."

1844.
Booth
v.
Vicars.

The testator left his widow Sarah Vicars, and also Nicholas Vicars and Mary Brown, surviving him. Sarah Vicars died in 1838, having survived both Nicholas Vicars and Mary Brown. Nicholas Vicars had six children, of whom one only, Elizabeth Credland, was living at the death of Sarah Vicars. Mary Brown had five children, two of whom, namely, Edward Brown and Elizabeth Coulthard, were living at that period. The pre-deceased children, however, of Nicholas Vicars and Mary Brown had children who were living at the death of Sarah Vicars, and they, together with the surviving children of Nicholas Vicars and Mary Brown, were found by the Master to be the next of kin of Nicholas Vicars and Mary Brown living at the death of Sarah Vicars.

At the time of the institution of this suit, Elizabeth Credland and Edward Brown were respectively the executrix and administrator of Nicholas Vicars and Mary Brown.

The bill was filed by the surviving executor under the will, for the purpose of having the fund distributed under the direction of the Court ; and the cause now came on for hearing for further directions.

Mr. *Sidebottom*, for the plaintiff.

Mr. *Simpkinson*, for William Vicars, the son and admi-

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 BOOTH
 v.
 VICARS.

nistrator of William Vicars, who was the son of Nicholas Vicars, and died in the lifetime of Sarah Vicars.—This party is entitled to a share in the residue, either as legal personal representative of his father William Vicars, who survived the testator, or in his own right as one of the next of kin of Nicholas Vicars, living at the death of the tenant for life. The latter construction is more beneficial to him and more consistent with authority. The word “next” implies affinity, and shews that the executors do not take, but only the persons answering the description of next of kin. The word “legal” shews that there is no difference between the pure next of kin (so to speak) and those under the Statute of Distributions. The words, therefore, taken together, mean next of kin under the statute: *Cotton v. Cotton* (a). And they take *per capita*, otherwise they cannot take “share and share alike.” [The *Vice-Chancellor*.—May not those words refer to the two original *stirpes*, and those alone?]

Mr. *Hislop Clarke*, for Elizabeth Credland and Edward Brown.—1st. Under the words “next legal representatives,” those who fill the character of executor or administrators of Nicholas Vicars and Mary Brown are entitled to take. 2ndly. As Elizabeth Credland was the nearest of kin in blood of Nicholas Vicars living at the death of the widow, and as Edward Brown and his sister were the nearest of kin in blood of Mary Brown at that time, they must take in exclusion of the persons who, together with them, were, at the death of the widow, the next of kin of the testator under the Statute of Distributions. 3rdly. If those persons are entitled to take, they take only by representation. Upon the first and second points, the observations of Sir *John Leach*, in *Saberton v. Skeels* (b), are applicable, where he holds that the words “personal repre-

(a) 2 Beav. 67.

388; and see *Baines v. Otty*, 1 M.

(b) 1 Russ. & M. 589; Taml. & K. 465.

representatives" are to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will. The same doctrine is laid down in *Price v. Strange* (a). In all the cases where "legal representatives" have been held to mean next of kin, there has been a marked intention to that effect. There is no intention here to benefit more than the two individuals, Nicholas Vicars and Mary Brown. The words used by the testator are at least as certain as the words "nearest relations" in *Smith v. Campbell* (b). In that case Sir William Grant said, that the persons so described were as easily ascertainable as the next of kin under the statute. Here, if you give full effect to the word "next," it must be considered to point to the nearest of kin. [The Vice-Chancellor.—The word is only an abbreviation of the word "nearest."] Then, upon the last point, the words "share and share alike," as your Honor has suggested, refer to the two first legatees: *Stamp v. Cooke* (c). In *Rowland v. Gorsuch* (d), where the testator directed that the residue of his fortune should be partaken of by the descendants or representatives of each of his first cousins deceased, in equal shares with his first cousins then alive, Lord Kenyon said,—“The difficulty arises on the words added to ‘descendants,’ namely, ‘or representatives.’ Now, if they take as representatives, they must take *per stirpes*: if any person is under the necessity of making his claim as representative, he must take the share in the same manner as the person he represents. I have had a little doubt, whether they take *per capita* or *per stirpes*; but, upon the whole, I think no person taking as representative can take otherwise than as the statute gives it to representatives, i. e. *per stirpes*.”

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Mr. Wright, for another party, suggested, that the exe-

(a) 6 Madd. 159.

(b) 19 Ves. 403.

(c) 1 Cox, 234.

(d) 2 Cox, 189.

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cutors and administrators of Nicholas Vicars and Mary Brown might be held to take beneficially: *Evans v. Charles* (a).

Mr. *Faber*, for Elizabeth Coulthard, and the children of deceased children of Mary Brown, observed that the division must be in moieties. Upon the force of the words, "next legal representatives," he cited *Bridge v. Abbot* (b).

Mr. *M'Christie*, for other parties.

In the course of the argument, the *Vice-Chancellor* referred to *Elmsley v. Young* (c) and *Clapton v. Bulmer* (d).

THE VICE-CHANCELLOR.—The whole language of this bequest seems to me of necessity to exclude the notion, that, under the words "next legal representatives," the executors or administrators of Nicholas Vicars and Mary Brown could take for the benefit of those executors or administrators themselves, as beneficial legatees. It is impossible to suggest that such a construction could be right.

The next question is, whether the true construction of the bequest is, that the executors of Nicholas Vicars and Mary Brown were intended to take in their character of executors or administrators, that is, not beneficially; a meaning of which, when the context allows or does not forbid it, the words "legal representatives" are susceptible. There are several remarks, however, to which this clause is liable, which seem to exclude that interpretation also. For, in the first place, I do not say in materiality, but in order, the words "executors or administrators" are used just above for another purpose, in their strict,

(a) 1 Anst. 128. This case seems to be overruled; see *Price v. Strange*, 6 Mad. 159; *Palin v. Hills*, 1 M. & K. 470; *Marshall v. Collett*, 1 Y. & C. 232.

(b) 3 Bro. C. C. 225.
 (c) 2 Myl. & K. 780; see 8 Jur. 161.
 (d) 5 Myl. & C. 108; 10 Sim. 426.

legal, and proper sense, and therefore, if he had meant executors and administrators here, the probability is, that he would have used the same phrase. In the second place, he has used the word "next" in combination with the words "legal representatives," which is a word having no connexion with the character of executor or administrator. And, thirdly, that construction would render the latter half of the bequest mere superfluity, because, supposing that by the words in question executors or administrators are meant, the fund would go in the same way without those words as with them. These are part of the considerations which seem to me to exclude that construction also. It follows, if this view of the subject be right, that the words "next legal representatives" must in this will import, in some form, consanguinity: the next question is, in what form?

Now, the words here are not "next of kin." There is no word strictly importing kindred. If the words had been "next of kin," or "nearest," or "next in relationship," it is possible that I might have applied the rule adopted by the Lords Commissioners in *Elmsley v. Young*, and have held, that the representatives of whom the statute speaks were excluded. But that is not so. The words "legal representatives" are the very words which in the Statute of Distributions are used to designate persons who, being of kindred to the deceased, come in as representatives of some one else. As to this part of the case, I need do no more than refer to the language of the Master of the Rolls in *Rowland v. Gorsuch* (a), and to the expressions so recently used by Lord Langdale in *Cotton v. Cotton* (b), where he says, "When it is said that the expression 'legal representatives' means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons, who,

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(a) 2 Cox, 187.

(b) 2 Beav. 70.

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upon the construction of the will, are beneficially entitled in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. I must, therefore, refer to the Statute of Distributions, which points out those who are entitled to claim as the legal representatives in that particular sense of the words." I also am of opinion upon this will, that the words "next legal representatives" mean the persons, who, by force of law, in right of consanguinity, would take the personal estate of those persons beneficially.

The next question is, whether they are to take *per stirpes*, or *per capita*. My opinion is, that they take *per stirpes*. The word "representatives" itself almost forces that interpretation: and when you consider, that, if one of the two persons mentioned in the will had survived the tenant for life, only a moiety could have gone under the clause of substitution,—that construction seems to be rendered absolutely necessary.

The next question is, at what period the representatives of each particular *stirps* are to be ascertained; whether at the death of Nicholas Vicars or Mary Brown, or at the death of the tenant for life? That has struck me as the most doubtful question upon this will; but my present impression is, that there is sufficient on the will to indicate an intention in the testator that those persons should take who filled that character when the fund came into possession. The word "then" is not conclusive upon the point, but, at the same time, it is not to be disregarded. This is to be considered as my opinion, unless, in the course of this week, I should mention the case again. If I should not, the fund will be declared to be divisible in moieties amongst the next of kin of Nicholas Vicars and Mary Brown living at the death of Sarah Vicars, that is *per stirpes*.

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JUMPSON v. PITCHERS.

Jan. 17th.

EDWARD HARRIS devised a freehold estate to his wife **Eleanor**, and his daughter, **Sarah Harris**, as tenants in common in fee, and died in 1770. After his death, a creditors' suit was instituted against his executors and devisees; and by a decree made in the cause, it was ordered that the estate should be sold, and that all proper parties should join in the conveyance. On the 18th June, 1772, the Master reported that **Elms Foster** was the best bidder for, and purchaser of, the estate. This report was confirmed absolute by an order dated the 14th July, in the same year. On the 20th July, it was ordered, that **Foster** should pay the purchase-money into Court, and be let into possession of the estate; and that all proper parties should join in the conveyance to him. On the 8th August, the Accountant-General signed his receipt for the purchase-money.

On the 14th of July, 1772, the day on which the report was confirmed absolute, **Sarah Harris** married **Thomas Jones**. There was nothing, however, in the above-mentioned orders and receipt from which the fact of such marriage could be inferred.

By indentures of lease and release, dated the 3rd and 4th of September, 1772, after reciting the above orders and the marriage, **Eleanor Harris**, and **Thomas Jones**, and **Sarah** his wife, conveyed and released the estate to **Foster** in fee; and **Jones** covenanted with **Foster**, that he, **Jones**, and his wife would levy a fine of the estate, in or as of the ensuing term. It did not, however, appear that a fine ever had been levied of the estate pursuant to the covenant.

Under these circumstances, it was contended by the defendant in the present suit, who was the purchaser of the

In 1772, a woman, who was a party to a suit in Chancery, and who was married, but whose marriage did not appear in any of the proceedings in the suit, was by an order in the suit, treating her as a feme sole, directed to convey a freehold estate to **F.**, a purchaser. She afterwards, together with her husband, executed a conveyance of the estate to **F.**, in which conveyance the husband covenanted with **F.** that he and his wife would levy a fine of the estate. It did not appear that a fine was ever levied. On a bill filed by a vendor, claiming under **F.**, against a purchaser, for specific performance, the purchaser objected to the title, on the ground of the want of a fine and the defectiveness of the proceedings in Chancery:—
Held, that the

objection was not one of title, but of conveyance, inasmuch as the order in Chancery, notwithstanding its informality, was binding on the married woman, and rendered her a trustee for the purchaser, and she was therefore compellable to complete the legal title.

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estate, and against whom the present bill had been filed to enforce the completion of the purchase, that, by reason of the irregularity of the orders, and of a fine not having been levied, the plaintiff, who claimed under Foster, had not made a good title; and the defendant took an exception to the report of the Master, who had found in favour of the title.

On the argument of the exception, it was said at the bar, but there was no proof of the fact, that in the year 1779 or 1780, Mr. and Mrs. Jones left Downham, in Cambridge-shire, where they had lived, and went and settled at George Town, in South Carolina.

Mr. *Wigram* and Mr. *Spurrier*, for the defendant, in support of the exception, said, that this case was distinguishable from *Doe d. Corbyn v. Bramston* (a), where the possession was derelict, and where, therefore, the interest of the party quitting possession might be barred after forty years (b). Here there was no abandonment of the property, but a conveyance, which was defective for want of a fine: Sug. V. & P., vol. 2, p. 354. They also referred to *Esdaile v. Stephenson* (c).

Mr. *Russell* and Mr. *Addis*, for the plaintiff.

Mr. *Speed*, for other parties.

The VICE-CHANCELLOR.—A person indebted devises his real estate to two women as tenants in common in fee. A creditors' bill is filed to have the testator's debts paid. A decree is made against the propriety of which nothing has been suggested, and therefore nothing can, I suppose, be said. The decree directs a sale of the estate; the estate is sold under it, and I must assume that it has

(a) 3 Ad. & Ell. 63.

(b) Stat. 3 & 4 Will. 4, c. 27, s. 17.

(c) 6 Madd. 366.

been regularly and properly sold. An order was obtained, confirming the purchase *nisi*, and nothing has been said against the regularity of that order. One of the devisees then marries, and on the day of the marriage an order is made confirming the purchase absolute; and by a subsequent order the purchaser is directed to pay his purchase-money into Court and be let into possession, and a conveyance was to be executed. The two orders, which were made after the marriage of the devisee, mention her by her maiden name only. It would have been more correct to have added the name of the husband, but the omission of it does not, I apprehend, invalidate the orders. The conveyance, however, which was directed to be executed, is executed by the unmarried devisee, by the husband of the other devisee, and by the wife, as far as it was possible for her to execute it. That a complete equitable title was obtained by the purchaser, it is impossible to doubt, and it is equally impossible to doubt that a complete legal title was obtained by him to one moiety of the estate, though not to the other moiety, by reason of the marriage. But I apprehend that the married devisee, under the orders of the Court which bind her, became absolutely a trustee for the purchaser, and was compellable to complete the legal title. That being so, I apprehend that the question was one not of title, but of conveyance.

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OVERRULE the exception without prejudice to the question, whether the legal estate in an undivided moiety of the property is or is not outstanding in Mrs. Jones, or any person or persons claiming under or through her.

As to derelict lands, see 2 Lev. 171; 2 Mod. 106: derelict personalty, Dr. & Stud., chap. 51: wrecks, 1 Rob. 37; 1 Hagg. Adm. R. 383; Dods. Adm. R. 46.

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*Jan. 29th,
30th.*

Legacies charged on real estate *held*, under the circumstances of the case, to be payable, notwithstanding the lapse of more than forty years from the testator's death to the filing of the bill; the statute 3 & 4 Will. 4, c. 27, not being applicable.

RAVENSCROFT *v.* FRISBY.

VALENTINE MORRIS, who was for some years Governor of the Island of St. Vincent, by his will, dated in December, 1788, directed that all his legacies and funeral and testamentary expenses should be first paid and satisfied, and he subjected and charged all his estates, real and personal, with the payment of the same. He then gave numerous legacies, amounting nearly to £3000, (amongst them three legacies of £100 each to his sisters Catherine Morris and Sarah Wilmot), and subject as aforesaid, he gave all his real estates, as to a moiety thereof, to Valentine Henry Wilmot for life, with remainder to Charles Ravenscroft and Sarah his wife for their lives, with remainder to Valentine John Ravenscroft, their son in fee, in case he should leave children, with a limitation, in case he died without children, to their daughter Louisa Ashley, in fee; and as to the other moiety, to Charles Ravenscroft and Sarah his wife, for their lives, with remainder to such uses as Sarah Ravenscroft should appoint. All the residue and remainder of his real and personal estate he devised to Charles Ravenscroft absolutely. And he appointed Tyrrell Herbert and William Taylor his executors in the West Indies, and Dunn his executor in England.

By a codicil, the testator directed that £500 should be paid to Charles Ravenscroft and Sarah his wife, out of the moiety of his real estate first devised.

The testator died in 1789, greatly embarrassed in his affairs. At the time of his death he was owner of five plantations in the Island of Antigua, viz. two called Crabbs and Loobys, which were mortgaged for £8086 to the assignees of one Ballmer, Jolly Hill, which was charged with annuities, but was under an agreement for sale to the annuitants in full satisfaction of their demands, and Wil-

loughby Bay, which was subject to a mortgage for £3000. The estate called Crabbs was likewise subject to incumbrances prior to that of Ballmer's assignees. All the estates were in the possession of incumbrancers.

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Herbert and Dunn, two of the testator's executors, renounced probate of the will: but in January, 1791, letters of administration with the will and codicil annexed were granted at the highest probate duty to Whytell in England for the use of the remaining executor, Taylor, in St. Vincent; and in November, 1803, Taylor himself proved the will in England. In 1809 and 1810 two several sums of £2400 and £836 were received by Taylor from the Government on account of the testator's estate. In 1815 Taylor died.

In 1816, and prior to the date of the deed after mentioned, the debt due to Ballmer's assignees had, in consequence of their having paid off the prior incumbrances on the Crabbs estate, and by the accumulation of interest and otherwise, amounted to £16,553.

By an indenture dated the 1st April, 1816, and made between Valentine Henry Wilmot, of the first part; Charles Ravenscroft and Sarah his wife, and Valentine John Ravenscroft, of the second part; and Frisby and others, assignees of Ballmer, of the third part; after reciting that the legacy of £500 given to Charles Ravenscroft and his wife still remained unpaid, and that they had consented to accept the sum of £800 for principal and interest in respect of that legacy, which sum of £800 was meant to be in full satisfaction and discharge of the said legacy of £500 and all interest due and payable in respect of it, and reciting that the sum of £16,553 was then due to the assignees from the estate of the testator, and that it was altogether impracticable to recover this sum from the yearly proceeds of the testator's estate; and that, with a view to have all the property of the testator absolutely sold, without the expense

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and delay of litigation, such arrangement as thereafter mentioned had been agreed to; it was witnessed, that, in consideration of £2000, part whereof was expressed to have been paid, and the residue agreed to be paid, in the manner therein mentioned, by the assignees to Valentine H. Wilmot, in respect of all his rights and interests in the real estates of the testator, the said V. H. Wilmot agreed to sell all such rights and interests to the assignees: and it was further witnessed, that, in consideration of £800, part whereof was expressed to be paid, and the residue agreed to be paid, in the manner therein mentioned, by the assignees to Charles Ravenscroft and Sarah his wife, in respect of the legacy of £500 by the said testator so given to them as aforesaid out of the moiety of his real estates, and also in consideration of the benefits eventually provided for the parties thereto of the second part, they the said parties thereto of the second part agreed to sell to the assignees all their rights and interests whatsoever in the real and personal estates of the testator. And it was thereby declared that the assignees should make absolute sale of all the testator's real estates, and should collect, get in, and recover all his outstanding and other personal estate, and that they should hold the money to arise from such sales upon trust to apply the same, first, in payment of the costs and charges incident to the said indenture and sale, and in payment to the assignees of the said debt of £16,553, and of the said sums of £2000 and £800, and all other principal monies then due to them from the estate of the said Valentine Morris; and, in the next place, in payment of all other the lawful charges and incumbrances upon the estates and property so to be sold, then late of the said Valentine Morris, according to their order and lawful priority; and to pay over the residue to the several parties thereto of the second part, according to their respective rights, shares, and lawful claims therein and thereto.

In 1817, there being no personal representative of Taylor,

administration *de bonis non* of the testator's effects was granted to the assignees of Ballmer.

Large sums were received and applied by the assignees in pursuance of the trusts of the indenture of 1816, and ultimately the trusts of that deed were satisfied as to the specific debts therein, and a considerable sum of money and unsold property were left in their hands.

Sarah Ravenscroft died in 1818, without having dealt with the property in any other way than as before mentioned; and Valentine John Ravenscroft died in 1828, without leaving any issue.

The bill was filed in 1830, by Charles Ravenscroft and Louisa Ashley, who, in the events that had happened, claimed to be entitled to the surplus property, against the assignees, and the personal representatives of Catherine Morris and Sarah Wilmot, praying for accounts of the property conveyed under the deed of 1816, and of the monies received and applied by the assignees under that deed, and that the surplus monies might be paid, and the unsold property conveyed to the plaintiffs.

Charles Ravenscroft died pending the suit.

By the decree made on the hearing of the cause, in 1836, it was referred to the Master to make the inquiries prayed for by the bill, and to take an account of the legacies of the testator.

Claims were made before the Master for the three legacies of £100 each, bequeathed to Catherine Morris and Sarah Wilmot, with interest from the end of a year from the testator's death.

Payment of these legacies being resisted on the ground of lapse of time, the claimants, in order to meet this objection, relied, first, on the circumstances under which the deed of 1816 was executed; secondly, the length of time, namely, from 1816 until shortly before the filing of the bill, during which it was necessary for the assignees to

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be in possession for the purposes of their trust, and during which they had, gradually only, paid off the testator's debts, and settled all the claims against his estate; and, thirdly, several letters from the testator's men of business and relations in the West Indies, to his relations in this country, extending over a period of six or seven years after his death, from which it appeared that the testator's affairs had been left in a state of the greatest complication and embarrassment, and that whatever personal property might at that time have come to the hands of his executor in the West Indies was probably absorbed by the testator's debts.

There was no evidence of any other claims for legacies having ever been made than those which have been mentioned.

The Master, by his report, dated in December, 1843, found, that, more than forty years having elapsed since the death of the testator, twenty-seven years of which expired between the day of his decease and the 1st of April, 1816, the legacies bequeathed by him must be presumed to have been satisfied; and he was of opinion and found, that nothing was then payable to the legatees out of the real and personal estate of the testator.

To this report exceptions were taken by the representatives of the three legatees (a).

Mr. *Russell* and Mr. *Caley Shadwell*, for the exceptions, contended that the present case was not within the stat. 3 & 4 Will. 4, c. 27, s. 40, as that act did not come into operation until after the 31st of December, 1833. That

(a) Similar exceptions had been taken to a former report of the Master, founded on less extensive evidence, in which he had come to the like conclusion. Those excep- tions had been allowed by the *Vice-Chancellor of England*, who, in disposing of the case, treated it as unaffected by the stat. 3 & 4 Will. 4, c. 27.

being so, the question was one of presumption only, and here the presumption arising from lapse of time was rebutted by the circumstances. The legatees, therefore, on the record would be entitled; and their title would let in the others not on the record: *Tollner v. Marriott* (a). [The Vice-Chancellor.—If the statute does not apply, and I think it must be taken that the Vice-Chancellor of England was of that opinion (b), the question may be, whether a man is to lose his legacy because he does not file a bill to redeem a West India mortgage. To a question of that description, the observations of Lord Eldon in *Fladong v. Winter* (c) seem applicable.]

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Mr. Younge, for the defendants, the assignees of Ballmer.

Mr. Wigram and Mr. Lee, for the plaintiff, in favour of the report.—Under the bill, as framed, no general account of the personal estate could have been taken; but, supposing it could, the case is within the statute: *Sheppard v. Duke* (d), *Sterndale v. Hankinson* (e), *Piggott v. Jefferson* (f). There is no acknowledgment whatever, as in *Lord St. John v. Boughton* (g), to take it out of the statute; and the word “recover” in the 40th section applies as well where the bill is filed before the statute as after, if the decree is made after: *Freeman v. Moyes* (h), *Towler v. Chatterton* (i). [The Vice-Chancellor.—If the deed of 1816 created a trust for the legatees, the question upon the statute is at an end. Then did that deed create such a trust, or could you, as between the legatees and that deed, interpose any rule or principle drawn from *Lord Lauderdale’s case* (k)?] That

(a) 4 Sim. 19.

(b) See ante, p. 20, note (a).

(c) 19 Ves. 196; see p. 200.

(d) 9 Sim. 567.

(e) 1 Sim. 393.

(f) 12 Sim. 26.

(g) 9 Sim. 219.

(h) 1 Ad. & Ell. 338.

(i) 6 Bing. 258.

(k) *Garrard v. Lord Lauderdale*, 3 Sim. 1.

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deed, being a contract between Wilmot and Ravenscroft and the assignees only, might have been annulled at any time with the consent of those parties. No one representing the testator's estate or the legatees generally was a party to it. Between 1815 and 1817 the testator's estate was unrepresented, and the administration which was taken out in 1817 cannot be considered as operating by relation. The deed, therefore, is out of the question, and the statute applies. Even if the statute did not apply, the mere hopelessness of parties in prosecuting their claims could not be used as evidence tending to rebut the presumption of payment: *Jones v. Turberville* (a). The Court, however, is relieved from any difficulty on this subject by the provisions of the legislature. [The *Vice-Chancellor*.—Can it be said, in a case where a testator's estate is so heavily charged with mortgages that it is uncertain whether a legatee will ever be paid his legacy, that he has a "present right to receive" it within the meaning of the statute?]

Mr. *Hall* appeared for other parties.

THE VICE-CHANCELLOR.—The trusts of the property to be administered in this suit are the trusts declared of the property comprised in the deed of the 1st April, 1816.

These trusts now to be performed, so far as they are unperformed, are in part for payment (after deducting some charges) of "all other the lawful charges and incumbrances upon the estates and property so to be sold, late of the said Valentine Morris, according to their order and lawful priority, and to pay over the residue unto the said several persons, parties hereto of the second part, their executors, administrators, and assigns, according to their respective rights." I am of opinion, that, plainly, the legacies given by Valentine Morris came within these words, "lawful charges and in-

(a) 2 Ves. jun. 11.

cumbrances," and, independently of that construction, would have been plainly due in point of honesty and justice. But, supposing that these parties of the second part could receive nothing till the legacies were paid, still such a time might have passed, such circumstances might have arisen, as that there might be no legacies to pay, and that, in that sense, the words "charge and encumber" might not have a subject on which to operate.

The first question, therefore, is, whether there is ground for coming to the conclusion that it may be presumed that the legacies, or any of them, were at this period satisfied. Morris had died in 1789. He had left his property in an extreme state of embarrassment. It was improbable that the assets could ever be sufficient for payment of the whole. Of all the property, or almost every thing, the mortgagees were in possession, whose redemption must have preceded the application of that property to legacies or the purposes of the will. Looking at the state of things which continued from the death of Morris to the year 1816, not forgetting the contents of the instrument of April, 1816, I am of opinion that it would be contrary to all probability, and to all reasonable presumption, and a miscarriage of any judge or jury, to suppose, from mere lapse of time, that any one of these legacies was paid. The presumption in fact, and in law, is, that up to that time they were not paid.

In 1816 there was no statutory bar to the claim of legacies. Generally speaking, a long lapse of time might lead to the presumption of payment of legacies, but that presumption, as the like presumption in the case of specialty debts, was liable to be rebutted by circumstances.

Believing that to be the law in 1816, and applying that law to the facts of this case, I must consider these legacies as due in 1816, and their payment provided for by means of a trust, which trust has been decreed to be executed in this Court. If so, it is not necessary to consider the statute.

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I think, however, though it is not necessary to decide the point, that the statute would not apply to this case.

Upon the exceptions and further directions,

DECLARE, that, having regard to the deed of 1816, and the other circumstances of the case, the facts and circumstances in evidence do not form a sufficient ground for the presumption that the legacies bequeathed by the testator, V. Morris, have been satisfied, or that nothing is now payable to the said several legatees; but this is to be without prejudice to the question, whether by any other evidence the whole, or any of them can be shewn to have been wholly or partially satisfied. Let the Master review his report as to the legacies.



Jan. 30th.
 Feb. 9th.

After a supplemental bill had been filed to carry on the accounts in a creditors' suit against the administratrix of an intestate, the administratrix married. Upon the husband appearing, and consenting to be bound by the decree, the usual supplemental decree was made, without requiring an answer from the husband, or altering the title of the cause.

SAPTE v. WARD.

IN 1835, a creditors' bill was filed against Grace Jane Ward, as the widow and administratrix of John Robert Ward. The usual decree was made in that suit, and some proceedings were had thereunder. A bill of revivor was afterwards filed against Mrs. Ward, and, upon the bankruptcy of the plaintiff in the revived suit, a supplemental bill was filed against the assignees of the bankrupt.

After the supplemental bill had been filed, Mrs. Ward married Mr. Buller. No change, however, in the pleadings took place in consequence of such marriage; and the supplemental suit now came on for hearing.

Mr. *Anderdon* and Mr. *Calvert*, for the plaintiffs.

Mr. *Pole*, for the defendant Mrs. Buller, observed, that, under existing circumstances, a decree against his client would be ineffectual; and he submitted, that the husband should be made a party to the suit.

Mr. *James* appeared for other parties.

Mr. *Russell*, *amicus curiæ*, said, that, supposing the husband to be made a party, the title of the cause must, nevertheless, remain unaltered, otherwise the depositions would be taken in a wrong cause.

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The VICE-CHANCELLOR said that the husband might be made a party to the suit, as claiming an interest, and he would allow the cause to stand over for the purpose of having that amendment made. The husband might, without answering, appear and consent to the usual supplemental decree.

On this day the cause again came on for hearing.

Feb. 9th.

Mr. *Pole* appeared for Mr. Buller, and consented to be bound by the decree as if he had answered.

It appearing, that, since the defendant Grace Jane Ward, the widow of John Robert Ward, put in her answer in this cause, she has married the defendant R. Buller, and the defendant R. Buller now appearing at the bar, and consenting to be bound by this decree in the same manner as if he had answered, &c. [Then followed the decree.]

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Jan. 30th,

31st.

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Testator devised and bequeathed to trustees a mixed fund of realty and personalty, upon trust from time to time to receive the rents, issues, and profits thereof, and therewith to pay certain

legacies; and upon further trust to pay, to and for the use, education, and maintenance of each of the daughters of his nephews A. and B., whether born in his lifetime or afterwards, the yearly sum of £40 apiece, until they should respectively attain twenty-five, or be married with consent of their respective parents or surviving parent, and on their respectively attaining that age, or being respectively married with such consent as aforesaid, in trust to pay each of them the sum of £1500 for their respective uses and benefit. A. and B. had daughters living at the death of the testator, and also after-born daughters:—*Held*, that the bequests of £1500, so far as they related to after-born daughters, were void for remoteness. But *quære*, whether these bequests were not valid with respect to the other daughters, and whether the annuities of £40 were not valid for all the daughters.

Testator, after devising a mixed fund of realty and personalty to trustees, upon trust to pay various legacies and annuities, directed, that they should invest all and singular the surplus of the rents, issues, and profits at interest, in their names, upon government security, and suffer the same to accumulate. And he declared that the trustees should stand seised of his said trust estate and the accumulations, upon trust, when and as soon as that *any son of either of his nephews A. and B.* should have attained the age of twenty-five, a valuation of his said trust estate should be made, and that the same should be then divided into as many equal lots as *there should be sons of his said nephews then living*; and that *each of his said nephews' sons*, when and as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children; and that, thenceforth, the said portion or share should be held by the trustees, upon trust for *the person so selecting the same for his life*, and after his decease, upon trust, as to one equal moiety, for his eldest son, and his heirs, &c., and as to the other moiety, for the rest of his children, and their heirs, &c.; and if but one child, both moieties for such child; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving lawful issue them or him surviving, the share of the party so dying was to go to the others and other of them; and if all but one should die without leaving lawful issue, the trustees should stand seised and possessed of the trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid; but if all his, the testator's, said nephews should depart this life without leaving lawful issue them surviving, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death, A. and B. had several sons living, and B. had a son born after that period:—*Held*, upon the construction of the will, that the trust for accumulation was so created that it might by possibility endure beyond the legal period, and that it therefore failed. *Held*, also, that such failure did not accelerate the postponed life interests in the residue given to the grand-nephews, inasmuch as the life interests so given, as well as the subsequent limitations, were void for remoteness.

A devise of real estate for life is invalid unless it vest within the compass of lives in being at the testator's death, and twenty-one years after the death of the survivor of them.

Before the Accumulation Act a testamentary trust or direction to accumulate, so worded as to be capable of lasting beyond the compass of lives in being at the testator's death, and twenty-

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WILLIAM BOUGHTON, clerk, by his will, dated the 1st July, 1831, after giving his household furniture and various specific chattels to his sister, Ann Boughton, for her own use, gave, devised, and bequeathed, to John James and his son John James, their heirs, executors, administrators, and assigns, all and singular his messuages, lands, tenements, and hereditaments real, and all other his

personal estate and effects of what nature or kind soever and wheresoever situate, to hold to them the said John James and his son John James, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon the trusts, and subject to the several annuities and charges thereafter, or by any codicil to the will, bequeathed, (that is to say), upon trust from time to time to receive the rents, issues, interest, dividends, and profits thereof, and of every part thereof, when and as the same respectively should become due and payable, and to retain thereout, yearly and every year, the sum of £10, as some remuneration for their trouble in the execution of that his will; and upon further trust, within twelve months after his, the testator's, decease, to invest the sum of £300 in or upon government security, in the names of trustees to be nominated by the vicar and churchwardens of the parish of Blockley, for the purpose of applying the dividends of such investment in the repair of a tablet in Blockley Church, and for the benefit of the poor of Blockley; and upon further trust, to pay certain specified sums to the testator's servants; and upon further trust, to invest the sum of £1500, in the names of the said trustees, upon government or real security, and to pay the interest or dividends thereof to the testator's niece Elizabeth, the wife of the Rev. John Prosser, for her life, for her separate use, and after her decease to her husband, for his life; and after the decease of the survivor of them, to pay or transfer the said sum of £1500 unto and amongst the child or children of the said niece who should be living at

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one year after the death of the survivor of those lives, would have been illegal and void for the whole, and such a trust or direction is not less illegal or void since the Accumulation Act.

A testator gave all his messuages, lands, tenements, and hereditaments, and all his personal estate, to trustees, to hold to them, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust to receive the rents, issues, and profits thereof, and to retain thereout yearly £10 for their trouble in the execution of the will, and then to pay legacies and annuities, with a direction, that certain charitable legacies should be paid out of his personal estate:—*Held*, that the whole of the property, both real and personal, was to be considered as one mass for the purpose of paying rateably the annuities and legacies, except the legacies expressly made payable out of the personal estate.

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her decease, in equal shares; and also upon trust, to pay to his niece Susan, the wife of Henry Whitehorne, the sum of £1500 for her own sole and separate use; and also upon further trust, to pay to and for the use, education, and maintenance of each of the daughters of his two nephews John Boughton and Joseph Boughton, whether born in his lifetime or afterwards, the yearly sum of £40 apiece, until they should respectively attain the age of twenty-five years, or be married with the consent of their respective parents or surviving parent; and, on their respectively attaining that age or being previously married with such consent as aforesaid, in trust, to pay each of them the sum of £1500 for their respective uses and benefit; and upon further trust, to pay the several annuities next thereafter mentioned. [Then followed several bequests of life annuities.] And upon further trust, that they, his said trustees or trustee for the time being, should pay the following legacies out of his *personal estate*, (that is to say), to the Society for promoting Christian Knowledge, &c. [Here followed several charitable bequests.] All which legacies, as well as the legacies to his servants, the testator directed to be paid free from legacy duty. The testator then proceeded as follows:—"And I do direct that my said trustees, or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall, out of the rents and profits of my said trust estate and premises, pay the following sums for the education, maintenance, or benefit of each of the sons of my said nephews John Boughton and Joseph Boughton, (that is to say), the sum of £30 apiece *per annum*, till they respectively attain the age of ten years; the sum of £50 apiece *per annum*, from that age till they respectively attain the age of fifteen years; the sum of £80 apiece *per annum*, from that age till they respectively attain the age of eighteen years; and from that age the sum of £150 apiece *per annum*, till they respectively attain the age of twenty-five years; but, in the event of the death of

any or either of them under such respective ages, the provision intended for such one or more of them as shall die under such age or respective ages shall no longer be paid or payable: and I direct my said trustees to invest all and singular the surplus of the rents, issues, and profits of my said trust estate and premises, (if any), after payment of the several annuities, legacies, and charges hereinbefore expressed, at interest, in the name or names of my said trustees or trustee for the time being, in or upon government security, and to suffer the same to accumulate: and I declare my will and mind to be, that my said trustees or trustee for the time being, and their heirs, executors, and administrators, do and shall stand seised of my said trust estate and the accumulations thereof (subject as aforesaid) upon the further following trusts, (that is to say), upon trust, when and so soon as that *any son of either of my said nephews John Boughton and Joseph Boughton shall have attained the age of twenty-five years*, a valuation of my said trust estate (subject as aforesaid) shall be made by my said trustees or trustee for the time being, or by such competent person or persons as they or he shall in their or his discretion appoint, and that the same shall be then divided into as many equal lots or shares *as there shall be sons of my said two nephews then living*, and that thenceforth distinct and separate accounts shall be kept of their respective portions, and that *each of my said nephews' sons*, subject to the proviso hereinafter contained, when and as they shall respectively arrive at the age of twenty-five years, shall choose one of such portions as the share or portion to be allotted for him and his children as hereinafter mentioned, and that thenceforth the said portion or share shall be held by my said trustees or trustee for the time being, or shall by him or them, by good and effectual conveyances and assurances in the law, be conveyed and transferred to two or more proper parties to be nominated by my said nephews' sons respectively, and to be approved

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by my said trustees or trustee for the time being, *upon trust for the person so selecting the same, for his life*; and from and after his decease, upon trust, as to one equal moiety, for his eldest son, and his heirs, executors, and administrators, and the other moiety for the rest of his children, and their heirs, executors, and administrators, in equal shares and proportions, and if but one, both moieties for such child, his or her heirs, executors, or administrators absolutely; but I declare my will to be, that, if any or either of my said nephews' sons shall depart this life under their respective ages of twenty-five years, or having attained that age shall afterwards depart this life without leaving lawful issue them or him surviving, then and in either of such cases the shares or share hereby intended for all and every, or any or either of such person or persons so dying under that age, or without leaving such lawful issue as aforesaid, shall go and belong to the others and other of my said nephews' sons in equal shares and proportions, and be added to their respective original shares or portions, and be subject to the same trusts and liable to the same contingency and accruer as is hereinbefore provided touching their or his original shares or share; and if all such nephews' sons but one shall die, without respectively leaving lawful issue them surviving, then my said trustees or trustee for the time being shall stand seised and possessed of the whole of my said trust estate and premises, subject as aforesaid, in trust for such one surviving nephew's son for his life, and for his children or child as aforesaid; but if all my said nephews' sons shall depart this life without leaving lawful issue them surviving, then upon trust for such person or persons as shall at that time be my heir-at-law, and to whom in such event I devise and bequeath all my real and personal estate, and the accumulations thereof, and to his or their heirs, executors, administrators, or assigns, absolutely. Provided, and it is my will and desire, and I do hereby direct, that, in the

apportionment or division of my trust estates, the eldest son of my said nephew John Boughton, who shall attain the age of twenty-five years, shall have the option of choosing my estate at Adsett and Stanway, to be conveyed in manner and upon the trusts aforesaid; and that, in case such estate shall be more than one equal share, the difference shall be charged upon the same estate to or for the benefit of one or more of the sons of my said nephews and their issue, so as to make such shares equal according to the valuation aforesaid: and it is my further will, that in such apportionment or division the eldest son of my said nephew Joseph, who shall attain the age of twenty-five years, shall have and be entitled to the option of choosing my estate at Treddington, to be conveyed in manner and upon the trusts aforesaid; and in case the valuation of such estate shall be more than equal share to be ascertained as aforesaid, that the difference shall in like manner, and for the like purpose, be charged upon the said estate at Treddington."

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The testator made a codicil to his will, which, however, did not affect the preceding devises.

The testator died in August, 1831, leaving his nephew John Boughton his heir-at-law, and leaving his sister Ann Boughton, his two nephews John and Joseph Boughton, and his three nieces Elizabeth Prosser, Susanna Whitehorne, and Caroline Wintle, his next of kin.

At the time of the testator's death, John Boughton had two sons living, namely, William, born in September, 1814, and John, born in June, 1810. Joseph Boughton had at the same time four sons living, one of whom afterwards died. Of these, the eldest, William, was born in September, 1822, and the youngest, in March, 1831. One son only of either of the nephews, Edward Vaughan Boughton, son of Joseph, was born after the testator's death. All the sons of either nephew, but one, were living after the commencement of the suit.

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At the time of the testator's death, John Boughton, the nephew, had three daughters living, and Joseph Boughton had two daughters living. They had afterwards two daughters born. All the daughters of the nephews, but one, were living after the suit was instituted. The eldest of them attained the age of twenty-one in May, 1842.

John Boughton, the nephew, died intestate in January, 1834, leaving William Boughton his heir-at-law, and heir-at-law of the testator. Joseph Boughton also died shortly before the institution of this suit.

The bill was filed by William Boughton, as heir-at-law of the testator, against the trustees, the next of kin of the testator, and the several parties interested under the will, and it prayed that it might be declared that the trusts of the testator's will concerning his real and personal estates thereby devised and bequeathed, and the surplus rents, issues, and profits thereof, subsequent to, and after paying and satisfying, the several annuities, legacies, and charges, given or created by the will, were void as being too remote; and that the said real estates, subject to a proper proportion of the said annuities, legacies, and charges, in case and to the extent only of a deficiency of the personal estate to satisfy the same, and also so much of the investment and accumulations made from the surplus rents, issues, and profits of the trust estate as had been derived from the real estate since the death of said testator's said nephew John Boughton, deceased, had become vested in the plaintiff, as such heir-at-law, &c.; and for consequential relief.

At the original hearing of the cause, various inquiries were directed relative to the state of the testator's family, upon which the Master having reported, the cause now came on for hearing for further directions. Two questions were raised:—First, as to the remoteness of the limitations. Secondly, as to whether the charges on the real

and personal estate were to be considered as affecting those estates *pari passu*, or how otherwise.

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Mr. *Swanston*, Mr. *Spence*, and Mr. *Lloyd*, for the plaintiff.—The question of remoteness seems too clear for argument. [The *Vice-Chancellor*.—It seems to be governed by *Hunter v. Judd* (a).] Then, upon the second point, we submit that the words at the beginning of the will, by which the testator gives all his real and personal estate to trustees subject to the annuities and charges thereafter bequeathed, amount to no more than a simple charge of his real and personal estates in the ordinary manner. The testator did not intend that those estates should be subject to the charge in an inverse order, or in any other than the usual course of law. The charity legacies are for an obvious reason expressly charged upon the personal estate; but the personal estate is not in any manner exempted as to the others. The real estate is not charged either primarily or co-ordinately with the personal estate; all that the testator meant was, that the legacies and annuities should not remain unpaid while there was any property, whether real or personal, wherewith to pay them: *Lord Inchiquin v. French* (b), *Harewood v. Child* (c). [The *Vice-Chancellor*.—Is this within that line of cases? It is one of the cases of aggregation of funds; in which Sir *John Leach* was generally disposed to apportion the burden between the real and personal estate. The *Vice-Chancellor of England* has, I think, rather more leant to the old rule.] In *Roberts v. Walker* (d) and *Dunk v. Fenner* (e), where Sir *John Leach* decided in favour of apportionment, a fund was already created. The real estate was sold, and the Court dealt with the proceeds. Here the funds are left in their natural character. There is no conversion—no consolidation.

(a) 4 Sim. 455.

cited.

(b) 1 Cox, 1 ; 1 Ambl. 33.

(d) 1 Russ. & M. 752.

(c) Ca. T. Talb. 204; 1 Cox, 7,

(e) 2 Russ. & M. 557.

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In *Attorney-General v. Southgate* (a), the *Vice-Chancellor of England* disapproved of the course taken by Sir John Leach. It is true that the decision in the last-mentioned case has been reversed, but the language of the *Vice-Chancellor* is applicable. And in *Roberts v. Roberts* (b), a still later case on the subject, his Honor says, "The rule of law is plain, that, ordinarily speaking, if a legacy be given, *prima facie* the personal estate is the fund to bear it; and if an annuity or legacy be given out of a mixed fund, still, unless there be express words exempting the personal estate, it is primarily liable." The question is, whether there are any such words here. [The *Vice-Chancellor*.—The testator directs, that, as between his nephews' sons, as they attain twenty-five, the trust estate shall be divided into lots: is it to be supposed that he entertained any view as to the difference of the liability of different portions of the property?] Whatever might be the effect of that part of the will if taken by itself, the subsequent passages shew a clear intention on the part of the testator that the real estate shall not be charged, at least not primarily: for, after directing that the estates shall be allotted, he provides, that, in the apportionment or division of his trust estates, the eldest son of his nephew John Boughton, who shall attain twenty-five, shall have the option of choosing his estate at Adsett and Stanway—a choice which never can take effect if real estates are charged. A similar observation applies to the Tredington estate.

In the course of the argument the *Vice-Chancellor* referred to the observations of Lord Eldon in *Bootle v. Blundell* (c).

The following cases were mentioned by Mr. Spence, as

(a) 12 Sim. 77.

(b) 7 Jurist, 315, 317.

(c) 19 Ves. 517. There is hardly a single circumstance, &c.

following the decision in *Roberts v. Walker* : viz. *Fourdrin v. Gowdey* (a), *Johnson v. Woods* (b), *West v. Cole* (c).

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Mr. *Anderdon* and Mr. *Bacon*, for parties in the same interest with the plaintiff.

The counsel on the other side were not heard upon the second point.

The VICE-CHANCELLOR.—A testator may, if he will, direct his legacies to be paid out of his real and personal estate, *pari passu*. The only question in each case is, whether he has said so or not.

Here the testator gives all his messuages, lands, tenements, and hereditaments real, and all other his personal estate and effects, of what nature, kind, or sort soever and wheresoever situate, to certain trustees, to hold to them, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon certain trusts; and the very first trust is, “to receive the rents, issues, interest, dividends, and profits thereof, and of every part thereof, when and as the same respectively shall become due and payable, and to retain thereout yearly and every year the sum of £10, as some remuneration for the trouble they may have in the execution of this my will :”—a charge on, and equally referable to, the realty and personalty, and plainly payable out of the general mass. He then goes on to direct them, in a similar way, to pay legacies; directing some to be paid out of the personal estate, and being silent as to others: and then he divides, or attempts to divide, his property in lots among his family. It is said, that in two or three instances (I think in two) he directs certain real estates to be allotted. That must be taken,

(a) 3 M. & K. 383.

(b) 2 Beav. 409.

(c) 4 Y. & C. 460.

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subject to any charge which the apportionment may render it necessary to make on them.

I am of opinion, that he has said, as plainly as if he had said it in the very words, that the whole of his property shall form one mass, for the purpose of paying rateably these annuities and legacies, except those which he has directed to be paid out of his personal estate.

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The cause now came on for argument, on the side of the defendants, upon the first question.

Mr. *Wigram*, for some of the next of kin of the testator, said, that, as the Court did not desire to hear the parties who insisted upon the remoteness of the limitations to the sons of the testator's nephews, it was not necessary for him to enter into that general question. He would, however, submit, that not only those limitations but the gifts of £40 apiece annually to the daughters of the testator's nephews, until they should attain the age of twenty-five, were also void. [The *Vice-Chancellor*. — Would they not be good to them for life, and if so, why not until the age of twenty-five? I think that several cases, of which *Beard v. Westcott* (a) is one, have decided that an estate for life may be limited to the unborn child of a living person, though in a will containing various limitations which are void for remoteness.] In that case the limitations were of realty, which take place by way of remainder. There is, it is conceived, more difficulty in limiting a mere chattel to an unborn person for life: *Hayes v. Hayes* (b). As a limitation over of a chattel takes place by way of executory gift, and not by way of remainder, it must take effect within the prescribed limit of time. The gift of an annuity is a gift of several and successive payments, and the payments limited to

(a) 5 Taunt. 393 ; 5 B. & Ald 801.

(b) 4 Russ. 311.

take effect after an unborn party attains twenty-one are void.

Mr. *Lee*, *amicus curiæ*, after replying to a question put to him by the Court in relation to the case of *Beard v. Westcott*, said that he had heard, on good authority, that Sir *John Leach* was dissatisfied with his own decision in *Hayes v. Hayes*.

Mr. *Simpkinson* and Mr. *Blower*, for Caroline Wintle, another of the next of kin.

Mr. *Kenyon Parker* and Mr. *Stinton*, for others of the next of kin.

Mr. *Russell*, (with whom was Mr. *Terrell*), for the defendant John Boughton.—First, although in the residuary clause there is reference to a particular time at which the sons of the nephews are to receive their shares of the residuary estate, yet, upon a fair construction of the will taken altogether, and of the authorities, there is ground to contend, that, upon the death of the testator, an interest vested in the sons of the nephew then living, in such a way as to admit their sons as they might be born from time to time until the period of distribution. The period of distribution mentioned in the first part of the residuary clause does not govern the time of vesting, but is simply a modification of the bequest. Although the gift is in the first instance in words which apparently suspend the vesting of it until a specified time, yet afterwards there is a limitation over depending on the party dying *without leaving issue*, and not having regard to that time. The whole of the property is to go among the sons of the nephews, except simply on one event, namely, “if all my nephew’s sons shall die without leaving lawful issue,” and without reference to any time of their so dying. The limitation over in this form prevents

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the operation which otherwise the former words would have, and will induce the Court to hold that the whole interest is vested. In *Bland v. Williams* (a), a leading case on this subject, the sole circumstance on which the Court held that the interests were vested was this: that, though the gift in the words of direct gift took effect in the children only on their attaining twenty-four, yet there were words which shewed that the testator contemplated that the gift over was not to take effect if they died under that age but left issue. The same considerations apply to this case; and here, supposing all the sons, except one, had died without leaving issue, then, upon the latter words of the gift, that one son would have taken for his life, without reference to age or any other circumstances.

But, secondly, there are other cases decided upon other principles, which shew the extent to which the Court has gone in declining to postpone the time of vesting till the period of enjoyment. In *Jackson v. Marjoribanks* (b), the words importing contingency and preventing vesting could scarcely be stronger than these, and yet the trust for the grandson prevailed. There, the case was argued in some degree (at least as regarded the real estate) on the principle of the cases of *Bromfield v. Crowder* (c) and *Phipps v. Ackers* (d), and that it was to be considered as a devise to any child who should be living at the death of the testator's son when he attained twenty-five years. That principle would equally apply to the real estates in this case: *Greet v. Greet* (e), *Davies v. Fisher* (f).

Lastly, conceding that the whole remains in contingency till some one son of a nephew attains twenty-five, yet this case does not fall within those in which it has been de-

(a) 3 Myl. & K. 411.

Sim. 44.

(b) 12 Sim. 93.

(e) 5 Beav. 123.

(c) 1 N. R. 313.

(f) 6 Jurist, 248.

(d) 3 Cl. & Fin. 702; see 5

cided, that, if a class contains persons *in esse* who might have taken, and also persons not *in esse* as to whom the objection of remoteness would apply, the whole is void; for here the alleged remoteness applies only to the event of an individual son attaining twenty-five, and not to a class: *Leake v. Robinson* (a), *Jee v. Audley* (b). And conceding that nothing is to vest until some one son attains twenty-five, yet the Court is entitled to look to the event, and ascertain whether a son has attained twenty-five who was living at the death of the testator: *Tregonwell v. Sydenham* (c).

That personal property may be given for life to the unborn child of a person *in esse*, is clear from *Cooke v. Bowler* (d).

Mr. Coote and Mr. Chandless, for the daughters of the nephews, and for the sons born in the lifetime of the testator. The annuities of £40 given to the daughters are valid. [The *Vice-Chancellor*.—I think so.] And the legacies of £1500 also given to them are valid. At all events, they are valid as to the daughters born in the lifetime of the testator. They are distinct legacies to individuals, and not a gift to a class, for the testator refers to those daughters who were *then* born, and those who might be born. Therefore the individual daughters born in the testator's lifetime take, as if they had been named. And it is submitted, that the after-born daughters also take, subject to their legacies being divested in the event of their dying under twenty-one or without being married.

With respect to the sons of the nephews, the testator uses no words referring to such as might be born after his death. He expressly directs his trustees, out of the rents

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(a) 2 Mer. 363.

(b) 1 Cox, 324.

(c) 3 Dow, 194.

(d) 2 Keen, 54.

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and profits of his estates, to pay certain annuities for the maintenance and education “of each of the sons of his nephews.” The question therefore is, whether, in speaking afterwards of the valuation and division of the property upon the sons attaining twenty-five, the testator is not referring to the sons to whom he had before given the annuities. Then to whom has he given the annuities? To the sons living at his death: *Jarman on Wills*, Vol. 2, p. 74; *Singleton v. Gilbert* (a). And even if a son came *in esse* after the testator’s death, yet, if he came *in esse* in the lifetime of the sons living at the death, there is ground to contend that he would take, if they attained twenty-five. In this view of the case, the estates taken by the sons would at least be estates for their lives, and no rule of law would be violated. In *Hunter v. Judd* there were certain special provisions which led to the conclusion that the interests were not intended to be vested until the age of twenty-five; but otherwise it was not denied, that, under a gift of the fund to the children to be transferred to them at twenty-five, they would have taken vested interests. Then, if the gift here is vested, and the time of payment only is postponed, it will not be made contingent by a direction for accumulation till the time of payment arrives: *Blease v. Burgh* (b). [The *Vice-Chancellor* referred to *Shaw v. Rhodes* (c).] Upon the question of remoteness generally, it is submitted, that the Courts have been always anxious to escape the rule of law, and to support the intention of the testator. Where the rule of law has prevailed, it has been either where the description of the

(a) 1 Cox, 68; 1 Bro. C. C. 542, n.

(b) 2 Beav. 221.

(c) 1 Myl. & Cr. 135. Affirmed in the House of Lords; see *Evans*

v. Hellier, 5 Cl. & Fin. 114. See the observations on these cases in Mr. Hargrave’s *Treatise on the Thellusson Act*, p. 85 et seq.

party to take has been such as to render the operation of the rule unavoidable, as in *Leake v. Robinson*, *Palmer v. Holford* (a), *Porter v. Fox* (b), and *Newman v. Newman* (c), or where the time appointed for vesting is, in express terms, beyond the legal period, as in *Ring v. Hardwick* (d). The case of *Bull v. Pritchard* (e) is at variance with other cases on the subject, and has not been approved. Upon the general question *Doe d. Dolley v. Ward* (f), *Doe d. Hunt v. Moore* (g), and *Love v. L'Estrange* (h) are in point; which last case is also an authority to shew that a direction to accumulate will not prevent the vesting.

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Mr. Teed and Mr. Rolt, for the defendant Edward Vaughan Boughton, contended, that, when the eldest of the nephews' sons living at the death of the testator attained twenty-five, all the gifts took effect in interest; and their client was entitled to a life estate, if not to an estate tail upon the *cy pres* doctrine. They cited *Warter v. Hutchinson* (i), *Nicholl v. Nicholl* (k), *Pitt v. Jackson* (l), *Vanderplank v. King* (m).

Mr. Cooper and Mr. Hallett, for the trustees.

The VICE-CHANCELLOR.—I stated on a former day, or meant to state, my opinion on some points of this case; I have in particular stated my opinion, that the pecuniary legacies and annuities given by the testator are, according to the true construction of his will, charged by it rateably

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(a) 4 Russ. 403.

(b) 6 Sim. 485.

(c) 10 Sim. 51.

(d) 2 Beav. 352.

(e) 1 Russ. 213.

(f) 9 Ad. & Ell. 582.

(g) 14 East, 601.

(h) 5 Bro. P. C. 59.

(i) 2 Brod. & Bing. 349; 5 Moore, 143.

(k) 2 W. Bl. 1159.

(l) 2 Bro. C. C. 51.

(m) 2 Hare, 1.

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and without preference upon his real and personal estate, except the bequests which he has particularly directed to be paid out of his personal estate.

Upon the next branch of the argument, the validity or invalidity, wholly or partially, of the gifts and limitations in favour of the children and grand-children of the testator's two nephews, John Boughton and Joseph Boughton, I heard, during the term, all the counsel in support of their validity; and having since had an opportunity of looking into the cases cited, and some other authorities, I find myself able, and think it convenient, now to dispose of some of the points discussed.

And, first, as to the question, whether a daughter of one of the two nephews, John Boughton and Joseph Boughton, who did not come into existence until after the testator's death, can claim now or hereafter a legacy of £1500 under the will. I think that she cannot. In my opinion the legacy of £1500, expressed to be given to her, is not so given as to vest in her upon her coming into existence, or upon her birth, subject to a postponement of payment, or subject contingently to be afterwards divested; but is given only when, and not before, nor unless, she shall attain the age of twenty-five, or marry under that age with the consent of her parents, or of her surviving parent. A marriage without that consent at or before the age of twenty-five could not entitle her to a legacy, according to the language that the testator has used; and it was plainly possible in his lifetime, and at his death, that the surviving parent of every daughter of his two nephews coming into existence after his death might be a person also not in existence at his death. I do not consider it material for the present purpose, whether the daughters, who came into existence before the testator's death, are or are not or may or may not become entitled to annuities of £40 under the will, or to legacies of £1500 each, as to which, and

also upon the second question, whether the sons of the two nephews, or any or which of them, are entitled to annuities, I say at present nothing.

Next, as to the meaning of the words, "any son of either of my said nephews, John Boughton and Joseph Boughton," and the words "as there shall be sons of my said two nephews then living," and the words "each of my said nephews' sons," I am of opinion that the testator, in using them, did not intend solely, or confine himself to, great nephews, who had come, or should come, into existence before his death; and consequently, if all his great nephews living when the will was made, and all his great nephews living at his death, had died bachelors under twenty-five, there might still be a son of one of the nephews capable of taking an interest in the residue under the language of the will, supposing all objection on the ground of remoteness out of the way. Such is my impression, notwithstanding Mr. Coote's very proper observations on the words "born in my lifetime or afterwards" being used as to great nieces, but not as to great nephews, and notwithstanding the arguments as to the construction of the gifts of annuities to sons of the nephews. And supposing it to be true, that a more limited and restricted construction of the will, as to the class and description of great nephews intended to be benefited, would have the effect of supporting provisions otherwise wholly bad; supposing it also to be true, that there is an executory trust in the will, yet neither on these considerations, nor by the case of *Mogg v. Mogg* (a), or any other authority, do I think myself warranted in such a limited and restricted construction—that is, in departing from the proper and ordinary meaning and sense of this testator's words as he has used them. It is, as I understand, admitted, that not any son of either of the testator's two nephews

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(a) 1 Mer. 654.

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died in the testator's lifetime leaving issue, or attained the age of twenty-five in his lifetime, or had issue living in the testator's lifetime or at his death.

Next, as to the *cy pres* question. Some, at least, of the counsel in support of the validity of the provisions in the will, have argued that, although it does not in terms give, or affect to give, an estate-tail to any person born or unborn, and although such dispositions as it contains relate to a mixed fund of personal and real property, the rule called the rule of interpretation *cy pres*, or the doctrine called the doctrine of *cy pres*, is capable of being applied to the provision in favour of the nephews' sons and their children. I find it impossible to accede to that argument. The doctrine has gone, at least, far enough; and without saying whether it ought to be brought to bear in any case upon the disposition of a mixed fund of real and personal estate, I think that it has no place in the present instance.

Having thus disposed of these points, I am ready to hear any further argument with which any of the counsel in support of the validity of the provisions in the will may, consistently with the views that I have stated, be desirous of assisting the Court.

Mr. *Russell* then argued in support of the limitations in the will, so far as they related to grand nephews born in the lifetime of the testator; distinguishing the present case from *Leake v. Robinson* and *Dodd v. Wake* (a); contending also that the limitations over had the effect of immediately vesting the estates given to the grand nephews: *Jarman on Devises*, Vol. 1, p. 738; *Doe v. Ward*, *Bland v. Williams*. [The Vice-Chancellor.—The devise over may be an *indicium* of intention, more or less valuable according to the context and the accompanying circumstances.

(a) 8 Sim. 615.

Other counsel argued on the same side (a).

The VICE-CHANCELLOR. — Neither the original argument, nor the argument just concluded, (for which, especially as being at my request, I have very much to thank the bar), has altered the impression which this will made on my mind when I first read it.

I apprehend, that, before the Accumulation Act, a testamentary trust or direction to accumulate, so worded as to last, or to be capable of lasting, beyond the compass of all lives in being at the testator's death and twenty-one years after the death of the survivor of those lives, would have been illegal and void for the whole, and that such a trust or direction is not less illegal or less void since the Accumulation Act.

The trust or direction to accumulate, in the present instance, as I read the will, was, to accumulate until an event which did not occur in the testator's lifetime, and was not impossible at his death, but which might remain possible, and not happen, during the compass of all lives in being at his death, and more than twenty-four years afterwards. I am of opinion, therefore, that it fails, and fails without accelerating or benefiting the postponed life interests in the residue given to the grand nephews, or either of them, as to which life interests, the testator by his will and codicils appears to me plainly to have given them, so as neither to commence nor to vest until some son of one of his two nephews should attain twenty-five. I think he has not given them so as to vest at his own death, subject to the postponement of enjoyment, and to be contingently devested: how then can they be supported?

(a) In the course of the arguments, Mr. *Chandless* observed that the proposition of Mr. Jarman, "that a devise to a person if he shall live to attain a particular age,

standing alone, would be contingent," was corroborated by an opinion given by Mr. Fearne. See Fearne's Post. Works, 191.

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Undoubtedly, as estates in fee may be well given, so life interests may be well given by will to the children of a living person, who is a bachelor at the testator's death. But as an estate in fee, to be devised validly, must be so devised as to vest within the compass of lives in being at the testator's death, and twenty-one years after the death of the survivor of them, so I conceive must a life interest. That it is limited in its duration can, I apprehend, make no difference. It may be true that a life estate, devised to a person not in existence at a testator's death, may be made by his will to cease before its natural termination at any time or upon any event; but that is a very different question. Can a provision, in a will, as to such a life estate, that the property in which it is given shall, during the life of the tenant for life, shift from him, and, the estate for the life not ceasing, be enjoyed during the residue of his life in some other manner, upon the happening of a contingent event beyond the compass of lives in being at the testator's death, and twenty-four years after the death of the surviving life, be good? I conceive that it cannot; and my opinion is, that the life interest in the residue given by this testator's will to the great nephews being so given as not to vest within the period prescribed by law—that is, being so given as that every life in being at his death, and more than twenty-four years beyond, might expire without the ascertainment what or whether any great nephew, or number of great nephews, could claim a life interest in the whole or any portion—the dispositions of the residue entirely fail. As to the limitations to the children of the great nephews, they are, in my opinion, most plainly void, as I think is the contingent limitation in favour of the person who should, at a future contingent period that the will mentions, be the testator's heir-at-law.

I agree that the question, whether estates and interests of this kind or description are or are not to be treated as

vested, is a question upon the whole contents of each particular will, and I repeat that I have not omitted to consider, nor do I question, the cases of *Bland v. Williams*, *Blease v. Burgh*, and *Doe v. Ward*. However rightly decided those cases may have been, they appear to me not to govern the present, or prevent the application to it of other authorities, some of which were mentioned during the former argument, and of principles rendering, in my judgment, unavoidable the conclusions that I have stated.

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THEOPHILUS WHARTON and Brian Wharton were seised in fee, in equal moities as tenants in common, of a freehold farm at Headington, in the county of Oxford, called the Wick Farm, which comprised, among other lands, a piece of land called Great Hill Ground, containing 19 a. 3 r. Theophilus Wharton was also possessed of a leasehold farm in Headington, called the Headington Farm, held under a lease for years of the president and scholars of Magdalen College, Oxford.

In October, 1825, it was agreed between the Whartons and Magdalen College, that Theophilus Wharton should, under the land-tax redemption acts, purchase of the college a piece of land (parcel of the leasehold farm) which was lying opposite his residence, and that the Whartons should sell to the college 6 a. 1 r. 28 p., part of the close called Great Hill Ground; and that the Whartons should exchange with the college 6 a., further part of the Great

Devise of "all that *freehold* farm called the Wick Farm, containing 200 acres or thereabouts, occupied by W. E., as tenant to me, with the appurtenances," to uses applicable to freehold property only. At the date of the will, and of the death of the testator, W. E. held, under a lease from the testator, 202 acres of land, which were described in the lease as the Wick Farm. Of these, twelve acres were leasehold:—
Held, that the twelve acres did not pass by the devise.

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Hill Ground, for certain lands belonging to the leasehold farm which were lying intermingled with the Wick Farm.

This agreement was carried into execution by indentures of lease and release, dated the 7th and 8th October, 1820, and by an indenture of exchange of the latter date. Notwithstanding this arrangement, however, the 6 a. 1 r. 20 p. and the 6 a. continued to be treated and occupied by the Whartons as part of Wick Farm, the lands being, in fact, in their personal occupation.

Theophilus Wharton died in October, 1831, having by his will, after devising a farm at Sutton, in the county of Oxford, as therein mentioned, devised all other his freehold and real estates to the use of his brother Brian for life, remainder to the use of his nephew Mark Theophilus Morrell in fee. And he devised all his leasehold messuage, farm, lands, and premises situate at Headington, and which he held as lessee under Magdalen College, to his said nephew Mark Theophilus Morrell, his executors, administrators, and assigns.

On the decease of Theophilus Wharton, Brian Wharton entered into possession of the Wick Farm, including therein the whole of the Great Hill Ground; and this was acquiesced in by Morrell, who at the same time took possession of the leasehold farm, exclusive of the Great Hill Ground.

By an indenture dated the 6th August, 1837, the college renewed the lease of the Headington Farm to Morrell, including therein the 6 a. 1 r. 28 p. and 6 a.

By an indenture dated the 29th September, 1838, Brian Wharton demised the Wick Farm by that description, and also described as containing by admeasurement 202 acres, more or less, to William Eeley, to hold to him, his executors, &c., for fourteen years. To this indenture was annexed a schedule of the demised lands, and in the schedule was mentioned Great Hill Ground. Immediately upon the

execution of this lease, Eeley entered upon and took and continued in possession of all the premises comprised in it.

Brian Wharton died in April, 1839, having by his will devised his moiety of "all that freehold messuage or tenement, farm, lands and hereditaments called the Wick Farm" to his wife Catherine for her life, with an ultimate remainder to Morrell in fee.

Upon Brian Wharton's death, his widow and Morrell shared the rents of the Wick Farm as occupied by Eeley in moieties.

Mark Theophilus Morrell, by his will, dated the 17th of November, 1841, devised as follows:—"I give and devise all that the one undivided moiety or equal half part which was devised to me in and by virtue of the will of my uncle Theophilus Wharton, of and in all that freehold farm called the Wick Farm, in Headington, containing 200 acres or thereabouts, occupied by William Eeley as tenant thereof to me, with the appurtenances, To the uses, upon the trusts, and in the manner following:"—[Here followed a devise to trustees upon trust for the testator's sister Mrs. Stone for life for her separate use, with remainders to such persons as she should appoint, and with an ultimate limitation to the use of testator's brother, James Morrell the younger, in fee.] "And I give and devise all that the other undivided moiety or equal half part which was devised to me in and by virtue of the will of my late uncle Brian Wharton, subject to an estate for life thereby given to Mrs. Catherine Wharton his widow, of and in the said freehold farm, called the Wick Farm, with the appurtenances, subject to the life estate of the said Catherine Wharton, To the uses, upon the trusts, and in manner following, that is to say, to the use of my brother, the said James Morrell the younger, for his life," &c. [Here followed a series of limitations all applicable to freehold estate.] The will then provided that it should be lawful for

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the owners or owner for the time being of the first legal estate of freehold in possession of each of the said moieties of the Wick Farm, to demise and lease the said farm, in moieties or altogether, unto any person or persons for any term or terms of years not exceeding twenty-one years in possession, for the best rent that could be obtained for the same, and upon such other terms as should be deemed reasonable, so that such rent were reserved so as to be incident to, and go along with, the freehold and reversion of the said premises. The testator then devised his freehold messuage at Sutton, and also all his leasehold farm-house, homesteads, lands, and tenements, at Headington aforesaid, containing about 170 acres, held under Magdalen College, Oxford, and then in the occupation of Thomas Burrows, jun., as tenant to him, with their respective appurtenances, unto and to the use of John Fisher and James Westell, a solicitor, their heirs, executors, administrators, and assigns, upon trust with all convenient speed after his decease to make sale and absolutely dispose of the said last-mentioned freehold and leasehold premises respectively, and to apply the monies arising from such sale in payment (after the discharge of incidental expenses) of all his debts, and all his funeral and testamentary expenses, in exoneration, so far as the same would extend, of his personal estate from the payment of such debts and expenses, and he gave the residue of the monies to arise from such sale unto the said John Fisher and James Westell. And he gave, devised, and bequeathed all his real estate not thereinbefore devised or disposed of, and all his residuary personal estate, unto his father James Morrell, Esq., his heirs, executors, administrators, and assigns, absolutely, subject only to the payment of such of his debts as the monies produced by the sale of the said premises comprised in the aforesaid trusts for sale should be insufficient to pay. And he appointed the said John Fisher and James Westell joint executors of his will.

The testator, Mark Theophilus Morrell, died in January, 1842.

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The bill, which was filed by the trustees and devisees of the Wick Farm under Morrell's will against his executors, and the husband of Mrs. Stone, after alleging that it was not necessary for the payment of the testator's debts to resort to the 6a. 1r. 28p. and 6a., prayed that it might be declared that the description in the will, "all that freehold farm called Wick Farm, in Headington aforesaid, containing 200 acres or thereabouts, and occupied by William Eeley, as tenant thereof to me, with the appurtenances," comprised the two pieces of land containing respectively 6a. 1r. 28p. and 6a., and that the same were effectually devised and bequeathed by the said will as parts of the Wick Farm for the benefit of the plaintiffs, Emily Stone and James Morrell the younger, and that the defendants, the executors, might assent to such devise and bequest of the said two pieces of land accordingly, and that, in order to such assent, all proper accounts might, if necessary, be taken, to ascertain the state of the assets of the said testator Mark Theophilus Morrell, and to clear his estate, as in the ordinary case of suits by specific legatees for their legacies.

The cause was heard on bill and answer. The executors, by their answer, admitted that the Wick Farm, at the time of making the will, did not contain more than 202 a. 4 p., or thereabouts, including the two pieces of land in question; but they denied (in answer to a charge contained in the bill) that the leasehold farm, at the time of making the will, comprised 170 acres, exclusive of the two pieces of land. On the contrary, they stated, that, without those two pieces, it did not exceed 140 acres in extent. They admitted that the two pieces of land were never in the occupation of Thomas Burrows, jun. (a)

(a) The executors claimed the two pieces of land in question as being comprised in the bequest to them of the leasehold tenements at Headington; but the Court gave no opinion upon this point.

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Mr. Russell and Mr. Chandless, for the plaintiffs.—In *Doe d. Denning v. Lord Cranston* *a.*, Parke, B., says, “The rule is, that, where any property described in a will is sufficiently ascertained by the description, it passes by the devise, although all the particulars stated in the will with reference to it may not be true.” [The Vice-Chancellor. —To that I agree; but is there any case in which, there being a subject to which the words of the will properly and correctly apply, they have been held to apply also to another subject?] In *Lease v. Lord Stanhope* *(b)*, there was property to answer every description contained in the will, and yet leasehold land was held to pass under the words “farms, lands, hereditaments, and real estate,” the whole having been let together as one entire farm, at one rent. [The Vice-Chancellor referred to *Goodtitle d. Radford v. Southern* *(c)*.] Here the devise is of the Wick Farm, described as freehold, with the appurtenances; and it appears that the leaseholds in question have been blended in enjoyment with the freehold part of the farm. These circumstances are strong to shew that the leaseholds were intended to be included in the devise: *Hobson v. Blackburn* *(d)*. It cannot be doubted, that, under the description of the Wick Farm, the testator intended all the farm which Eeley occupied. He describes it, certainly, as freehold; but if he meant to give the whole of a particular subject, which is part freehold and part leasehold, will the word “freehold” be so strong as to exclude a devise of the leasehold? Does it shew that the testator meant to devise the freehold only, and not the whole farm?

The Vice-Chancellor, in the course of the argument, referred to *Miller v. Travers* *(e)* and *Arbail v. Fletcher* *(f)*.

(a) 7 M. & W. 1. See p. 10.

(b) 6 T. R. 345. See *Ree d. Casely v. Fernon*, 5 East, 51.

(c) 1 M. & S. 299. See *Dunn*

v. Dunn, 7 Tamm. 345.

(d) 1 Myl. & K. 571.

(e) 5 Bing. 244.

(f) 10 Sim. 299.

Mr. *Wigram* and Mr. *Parry*, for the defendants, were stopped by the Court.

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The VICE-CHANCELLOR.—I do not dispute the correctness of the cases which have been cited, but I am unable to view this as a case of what is called *falsa demonstratio*.

The word “freehold,” as used in this will, seems to me a necessary part of the description, which cannot be rejected. If it had been omitted, the probability is, that the leasehold in question would have been held to pass. Again, if the whole of the farm had been leasehold, the insertion of the word “freehold” would probably not have been material. But there is a subject here which properly answers the description given in the will. There is a freehold farm called Wick, which contains 200 acres, or thereabouts, (incorrectness, if there be any incorrectness in that respect, is immaterial), and which is occupied by Eeley. Being of opinion that the freehold part of the farm is properly described by those words in the will, although the leasehold should be abstracted from it, I am obliged to say that not any leasehold land, although used and treated as freehold, can pass under this devise. I regret to be obliged to come to this decision, inasmuch as I think it likely that the testator intended otherwise, but did not sufficiently, or did not accurately, inform his solicitor of the circumstances of the property.

Dismiss the bill, but without costs.

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Under a marriage settlement certain money and stock in the funds were vested in trustees upon trust, during the joint lives of the husband and wife, to pay the interest and dividends to such persons and for such purposes as the wife, notwithstanding the coverture, should, by any writing under her hand, except in any mode of anticipation, direct or appoint; or, in default of such direction or appointment, into her own hands for her own sole and separate use, independently of her husband; and so that her receipts, notwithstanding the coverture or the receipts of the appointee, might be good discharges:—
Held, that the effect of this instrument was to restrain the wife from anticipation, whether by an appointment under the power, or by an assignment independent of the power.

BY the settlement made on the marriage of Henry Glover Moore with Elizabeth Bramall in January, 1808, sums of money and stock in the funds were settled upon trust, that the trustees should, during the joint lives of the said Elizabeth Bramall and Henry Glover Moore, receive and take the interest, dividends, and yearly produce of the said premises, when and as the same should from time to time become due and payable, and pay and apply the same unto such persons and for such purposes as the said Elizabeth Bramall, notwithstanding her then intended marriage, should, by any writing under her hand, except in any mode of anticipation, direct or appoint; or, in default of such direction or appointment, into her own hands, for her own sole, separate, and peculiar use and benefit, independently and exclusively of the said Henry Glover Moore, and so and in such manner that the same might not be under his control, or subject or liable to his debts, contracts, forfeitures, or engagements, and so and in such manner that the receipt of the said Elizabeth Bramall, notwithstanding her intended coverture, or of the person or persons to whom she might appoint the same interest, dividends, and yearly produce, when due, to be from time to time paid, might be good and effectual discharges for the money which should be thereby expressed to be received; and, after the decease of either of them the said Henry Glover Moore and Elizabeth Bramall, then upon the trusts therein declared.

The trustees of the settlement having improperly applied the trust funds for the benefit of the husband, and Mrs. Moore having, in consequence, been for some years out of

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The separate fund of a married woman protected against costs, on the ground, that, under the instrument through which she derived title, she was restrained from anticipation.



the receipt of the income, a suit was instituted by her against the trustees for a restitution of the fund; and, by the decree made in 1838, they were ordered to make good the trust fund, and it was ordered that an account should be taken of the income which had or would have accrued from the 30th November, 1830, if the trust funds had not been misapplied, and of what was then due to Mrs. Moore in respect of such income.

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By an indenture, dated the 19th May, 1842, and made between Henry Moore and Elizabeth his wife, of the one part, and Frederick Asprey, of the other part, in consideration of 308*l.* 9*s.* therein mentioned to be owing from the said Henry Glover Moore and Elizabeth his wife, or one of them, to the said Frederick Asprey, and for securing the repayment thereof, and such other sum or sums of money as thereafter mentioned, and the interest thereof, All those the dividends, interest, and annual produce, or monies equivalent to interest, dividends, and annual produce, then due and owing, or which thereafter might be decreed to be then due and owing, or which, on the further hearing of the said cause, on further directions, might be decreed or ordered to be paid to the said Elizabeth Moore for her separate use, under or by virtue of the said settlement, for or in respect of the trust funds and premises comprised in, or subject to, or which ought to be subject to, the trusts and provisoes of the same indenture, were assigned by Henry Glover Moore and Elizabeth his wife to the said Frederick Asprey, his executors, administrators, and assigns, subject to a proviso for making void the said indenture upon payment by the said Henry Glover Moore and Elizabeth his wife to the said Frederick Asprey of the said sum of 308*l.* 9*s.*, and all such further advances, not exceeding in the whole, together with the original sums, the sum of £500, as the said Frederick Asprey might make to or for the benefit of the said Henry Glover Moore and Elizabeth his wife, or either of them, together with interest

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for the same, at the time and in the manner therein mentioned.

At the time of the execution of this mortgage, the arrears due to Mrs. Moore, in respect of the trust monies, amounted to the sum of 333*l.* 2*s.* 11*d.*, which being increased by some small sums for interest, calculated to the 19th May, 1842, (the date of the mortgage-deed), amounted to 342*l.* 12*s.* 1*d.*

By an order dated the 12th December, 1843, made on the hearing of the cause for further directions, it was ordered, that the trustees should pay into Court the sum of 594*l.* 5*s.* 11*d.*, being the net amount of arrears of income due and to become due to the plaintiff Mrs. Moore; and it was ordered, that the same sum, when so paid in, should be paid to Mrs. Moore upon her sole receipt.

Asprey having made further advances to Mr. and Mrs. Moore on the mortgage security, and having had no notice of the order of the 12th December, 1843, until some time after that date, now presented his petition jointly with a Mr. Dod, to whom he had since assigned his interest in the security, praying, that out of the said sum of 594*l.* 5*s.* 11*d.* the sum of 495*l.* 9*s.*, being the total amount due on the mortgage security, and also the costs of the petition, might be paid to Dod, and the balance paid to Elizabeth Moore, on her sole receipt, or that the fund might not be paid out of the Court without notice to him.

Mr. *Shapter*, for the petitioners, said, that, with respect to the sum of 342*l.* 12*s.* 1*d.*, being the arrears due at the date of the mortgage, there could be no doubt that Asprey or his assignee was entitled to them. He also contended, upon the authority of the cases of *Barrymore v. Ellis* (a) and *Brown v. Bamford* (b), that he was entitled to be paid the rest of his debt out of the residue of the sum of 594*l.* 5*s.* 11*d.* He also asked for costs. [The *Vice-Chan-*

(a) 8 Sim. 1.

(b) 11 Sim. 127.

cellor.—In *Barrymore v. Ellis*, I think that there were particular circumstances, and that the point on which it was decided was not the only difficulty with which the plaintiff had to contend.]

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Mr. *Swanston* and Mr. *Bacon*, for Mrs. Moore, contended against the authority of the two cases which had been cited, and observed, that the latter was under appeal and stood for judgment. They also insisted, that the petitioners were not entitled to receive costs, inasmuch as that would give to the mortgage-deed the effect of anticipating the married woman's income to the extent of those costs.

The VICE-CHANCELLOR, (after observing, that it was quite clear that the dividends which accrued due before the assignment were not protected).—I have always considered, that where there is a trust for the separate use of a married woman, she may appoint such person as she may think proper to receive the fund for her; and that that appointment may be prospective or in anticipation. She is made a feme sole as to the subject of the trust. The interest, however, of a married woman, in this respect, being a creature of equity, has been subjected to peculiar rules by the same jurisdiction; so that, though a person not a married woman cannot be restrained from alienating such interest as that person has, yet, as the separate interest given to a married woman is altogether artificial, her prospective power of appointment may be restrained. That is now, I apprehend, the settled law. The intention, however, to restrain must appear, otherwise the prospective power of appointment, or power of anticipation, remains. The true construction of the instrument in the present case appears to me to be this, that, until appointment by the wife, the interest shall be paid only into the wife's *own hands*, and she is not to appoint, so as to assign or encumber the property prospectively; the effect of which

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is to restrain her from anticipation altogether. This expression of my opinion is confined to the instrument before me, and does not extend to other instruments. I think that there is a specific difference—I do not say whether an important or unimportant, a material or an immaterial, difference—but a specific difference, between the language of the instrument in this case and the language of the instruments in those cited.

The counsel for Mrs. Moore then claimed a deduction of 16*l.* 17*s.* 4*d.* from the sum of 342*l.* 12*s.* 1*d.*, to which, under the foregoing decision, the petitioners were entitled. The deduction was claimed on the ground, that, upon the payment by the trustees to Mrs. Moore of the arrears of income due up to November, 1839, the date of the Master's report, 16*l.* 17*s.* 4*d.* had been overpaid by the trustees by mistake. It was argued that it was overpaid for income.

The VICE-CHANCELLOR.—With regard to the sum of 16*l.* 17*s.* 4*d.*, I understand the case to be thus:—It was a sum not in any sense due for interest. It was a sum clearly beyond all that was due for interest when it was paid, but it was paid by mistake, and received by a married woman restrained, as I think, from anticipation: there was, therefore, no claim to recover it back either in law or in equity. It appears that she afterwards made an assignment of all the arrears for value. Having done this she agreed that this sum should be deducted out of the arrears assigned; that she could not do without the consent of the prior assignee. I am of opinion, therefore, that the trustees must lose the money, unless she consent that they shall deduct it out of the income since accrued and now due.

As to costs, I am struck with Mr. *Bacon's* observation, that, if I were to give the petitioners their costs generally, I should charge the fund by way of anticipation. I think,

therefore, the costs of the petitioners must come out of the fund affected by their incumbrance.

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The VICE-CHANCELLOR afterwards, upon again referring to the deed of the 19th May, 1842, said, that he much doubted whether it was intended to include in the assignment future dividends. If it were not so intended, all that he had said as to the construction of the settlement must be considered as extrajudicial; whatever degree of weight, however, might belong to his opinion, he adhered to it.

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BY the settlement, dated the 21st April, 1831, and made previously to the marriage of Frederick William Gough and Ann Andrews, a certain freehold messuage and lands, called the Lynch, situate in the parishes of Bromfield and Little Hereford, in the county of Hereford, the property of the wife's father, Charles Andrews the elder, were conveyed to the use of the said Charles Andrews and his heirs until the marriage, then to the use of the said Charles Andrews for life, without impeachment of waste, and from and after

C., before the marriage of his daughter, conveyed certain lands to the use of himself for life, with remainder to trustees for a term of 200 years, upon trust for securing a rent-charge of £100 per annum to the husband and wife for

their joint lives, and the life of the survivor; and from and after the expiration or sooner determination of that term, and in the meantime subject thereto and to the trusts thereof, to the use of other trustees for a term of 1500 years, with remainder to C. in fee. The trusts of the 1500 years' term were declared to be as follows:—That the trustees should, after the decease of C., (*but subject and without prejudice to the yearly rent-charge and the remedies for securing the same*), by mortgage or sale or other disposition of the settled estates, or out of the rents thereof, levy and raise £2600, in trust for all and every the child and children of the marriage, or such one or more of them, exclusive of the others, and in such shares &c., and with such annual or other sums of money for the maintenance of such children from and after the decease of C., as the parents should by deed appoint: *Held*, that the 1500 years' term did not wait for its commencement until the death of the survivor of the husband and wife, but commenced at the death of C.; and therefore that it was competent to the parents, after the death of C., by deed executed in pursuance of their power, to direct an annual sum to be raised out of the estates for the maintenance of their children born and to be born.

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his decease, to the use and intent that S. H. Godson and Thomas Freeman, and the survivor of them, his executors and administrators, should receive out of the said hereditaments, during the natural lives of the said F. W. Gough and Ann Andrews, and the survivor of them, an annual rent-charge of £100, upon the trusts thereafter expressed, and payable as therein mentioned, with powers of distress and entry; and from and immediately after the decease of the said Charles Andrews the elder, subject to and charged and chargeable with the said annual rent-charge of £100, and to the powers and remedies thereby given for the recovery thereof, to the use of Charles Andrews the younger and Thomas Powell, their executors, administrators, and assigns, for the term of 200 years from thence next ensuing &c., upon the trusts thereafter declared. And from and after the expiration or sooner determination of the said term of 200 years, and in the meantime subject thereto and to the trusts thereof, and also subject to and charged and chargeable with the said rent-charge of £100, and the powers and remedies thereby given for the recovery thereof, to the use of the said S. H. Godson and Thomas Freeman, their executors, administrators, and assigns, during the term of 1500 years from thence next ensuing, upon the trusts thereafter declared; and from and after the expiration or sooner determination of the said term of 1500 years, and in the meantime subject thereto and to the trusts thereof, and also subject to and chargeable with the said rent-charge and the aforesaid powers for the recovery thereof, to the use of the said Charles Andrews the elder, his heirs and assigns, for ever.

The settlement then contained a declaration that the rent-charge of £100 was thereby limited to S. H. Godson and Thomas Freeman, upon trust to pay the same to such person or persons as Ann Andrews should from time to time during her life, notwithstanding her coverture, appoint as therein mentioned, and in default of such appointment to

her separate use: and after her decease, in case her husband should survive her, upon trust to permit him and his assigns to receive and take the yearly rent-charge for his and their own use and benefit. And it was thereby declared that the trusts of the 200 years' term were for better securing to Godson and Freeman the payment of the said annual rent-charge of £100. And it was also declared, that, if the heirs, executors, or administrators of Charles Andrews the elder should from and after his decease well and truly pay or cause to be paid to the said Godson and Freeman, or the survivor of them, or the executors, administrators, or assigns of such survivor, upon the trusts and for the purposes aforesaid, the said clear annual rent-charge of £100 on the days and in manner therein mentioned, then, and in such case, it should be lawful for the heirs or assigns of the said Charles Andrews the elder to receive and take the whole rents and profits of all and singular the said capital messuage, &c. to and for their own use and benefit, anything thereinbefore contained to the contrary in anywise notwithstanding.

The indenture then contained a proviso, that, from and after the decease of the survivor of the said F.W. Gough and Ann Andrews, and full payment of the said rent-charge and the arrears thereof, and all costs, &c., the term of 200 years should cease, determine, and become void.

The indenture then declared, that, as to the term of 1500 years thereinbefore limited in use to the said S. H. Godson and Thomas Freeman, their executors, administrators, and assigns, the same was so limited to them, upon the trusts, and subject to the powers, provisoes, and conditions, thereafter expressed and declared; (that is to say), upon trust, that they the said S. H. Godson and Thomas Freeman, and the survivor of them, and the executors, administrators, or assigns of such survivor, should, after the decease of the said Charles Andrews the elder, (but subject, and without prejudice, to the said yearly rent-charge


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of £100 thereinbefore limited in use to the said S. H. Godson and Thomas Freeman, during the lives of the said Frederick William Gough and Ann Andrews, and the survivor of them, and to the powers and remedies thereinbefore given for securing the punctual payment thereof), by mortgage or sale, or other disposition, of all or any of the said capital messuage, &c., or any part thereof, for all or any part of the said term of 1500 years, or by and out of the rents, issues, and profits thereof, or by all or any of the said means, or by such other ways or means as they the said S. H. Godson and Thomas Freeman, or the survivor &c., should think proper, levy and raise the sum of £2600, in trust for all and every the child and children of the said Frederick William Gough by the said Ann Andrews, or any such one or more of them, exclusive of the other or others of them, to be paid to such child or children, at such days or times, and in such parts, shares, and proportions, (in case there should be more children than one), in such manner and form, and subject to such provisos, conditions, and limitations over, (in case there should be more than one such child, such limitations over to be for the benefit of some or more of such children), and with such annual or other sum or sums of money for the maintenance of such child or children, *from and after the decease of the said Charles Andrews the elder*, until their, his, or her separate share or shares thereof should become payable, (not exceeding the interest of their, his, or her respective share or shares, after the rate of £4 for each £100 by the year), as the said F. W. Gough and Ann Andrews, by any deed or deeds, writing or writings, with or without power of revocation, to be by them sealed and delivered in the presence of and attested by two or more credible witnesses, should direct, limit, or appoint: with a limitation, in default of such appointment, to all the children of the marriage in equal shares, to be payable to the sons at their respective ages of twenty-one, and to daugh-

ters at twenty-one or marriage, *provided the times of payment should happen after the decease of Charles Andrews the elder and F. W. Gough*; but if any of the said children, being a son, should attain twenty-one, or, being a daughter, should attain that age, or marry, in the lifetime of the said Charles Andrews the elder and F. W. Gough, or the survivor, then to be paid within three calendar months after the decease of the survivor of the said Charles Andrews the elder and F. W. Gough, with interest at £4 per cent. from the death of such survivor; provided, that, notwithstanding the postponement of the payment of such shares till after the death of the survivor of Charles Andrews the elder and F. W. Gough, the shares should vest in the sons at twenty-one, and in the daughters at twenty-one or marriage.

The indenture then declared, that, in default of appointment of maintenance by the said Frederick William Gough and Ann Andrews, under the power thereinbefore contained, it should be lawful for the said S. H. Godson and Thomas Freeman, or the survivor of them, or the executors, administrators, or assigns of such survivor, at any time after the decease of the said Charles Andrews the elder, (but subject and without prejudice as aforesaid), to levy and raise, by all or any of the means aforesaid, for the maintenance of all and every such child or children as aforesaid, whose portion or share, portions or shares, might not then be vested, until his, her, or their portion or respective portions should become vested and payable, or he, she, or they should die, (which should first happen), such yearly sum or sums of money as should be equivalent to the interest of his, her, or their portions or portion, respectively, after the rate aforesaid, to be paid half-yearly, on the two most usual feasts or days of payment in every year, by even and equal payments, the first payment thereof to be made on such of the said feasts or days as should first happen after the decease of the survivor of the said Charles Andrews the elder and Frederick William

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Gough, or at such other days or in such manner as the said trustees or trustee should in their or his discretion see fit. The indenture also contained a power enabling the trustees of the term of 1500 years, at any time or times after the decease of Charles Andrews the elder, to levy and raise any sums of money, not exceeding one moiety of their portions respectively, for the advancement of the children.

By a deed-poll under the hands and seals of Frederick William Gough and Ann his wife, duly executed in pursuance of the settlement, and dated the 26th March, 1842, reciting the settlement and the marriage, and that there were then three children of the marriage, and reciting the death of Charles Andrews the elder, and that F. W. Gough and his wife had agreed to exercise the joint power of appointing £2600, given to them by the settlement, in favour of their children, it was witnessed that the parties thereto, in pursuance of the power so given, did thereby jointly direct, limit, and appoint that the said sum of £2600 authorized by the settlement to be raised by the trustees of the 1500 years' term (but subject to the rent-charge of £100, and the 200 years' term for securing the same) should be levied and raised by the trustees of the 1500 years' term, upon trust for all and every children or child then already born and thereafter to be born of the marriage, who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, equally to be divided between them, as tenants in common, &c. And the parties to the deed-poll thereby further directed and appointed, that, in the meantime, from and after the execution of that deed, but subject and without prejudice to the rent-charge and the remedies for the same, the trustees of the 1500 years' term should, out of the annual rents and profits of the premises comprised in that term, so far as they would extend, pay, levy, and raise such sum or sums of money as should be equivalent to interest at the rate of £4 per cent. per an-

num upon the said sum of £2600, and pay and apply such interest by equal half-yearly payments, for the maintenance of the children or child for the time being presumptively entitled to such sum of £2600.

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The trustee for the time being of the settlement having declined to raise interest on the £2600 for the maintenance of the infant children of Mr. and Mrs. Gough pursuant to the settlement and appointment, the object of the present bill, in which the plaintiff was one of those children, was to effect that purpose. The bill prayed that it might be declared that interest after the rate of £4 *per cent. per annum* from the decease of Charles Andrews the elder, and future interest thereon after the same rate, until the sum of £2600 should be raised, ought to be raised for the benefit of the plaintiff and the other children born or to be born; that all proper accounts might be taken; that the trustee might be directed to raise such interest, and also such future interest; and that the same might be applied for the maintenance of the plaintiff and such other children, or otherwise secured and accumulated for their benefit.

Mr. *Russell* and Mr. *Simpson*, for the plaintiff, said that the construction put upon the settlement on behalf of their client was a reasonable one, viz. that a sum for maintenance was raiseable immediately after the death of the grandfather, and in the lifetime of the husband. It was reasonable to suppose that the grandfather considered that during his own life the children might be otherwise provided for, but that upon his death it might be necessary, although in the lifetime of the father, to provide for their maintenance by settlement. The nature of the settlement and the circumstances of the property rendered this probable: the question was, whether the words of the settlement could bear such a construction.

Mr. *Lloyd*, for the infant defendants.—The terms of the

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settlement, as to the time from which maintenance is to be raised on the £2600, in case an appointment is made, are explicit. That sum is to be raised with such annual sums for maintenance as the parents shall appoint “*from* and after the decease of Charles Andrews the elder.” The word “*from*” seems to point to the very time of his death as the time for raising the maintenance. Then does the subsequent clause, which provides for interest, in the event of maintenance not being appointed, and in which the word “*from*” is not used, give a more restricted meaning to the maintenance clause? It is submitted that it does not: inasmuch as the parties might reasonably have intended that maintenance should be raised *instantly*, but that interest should be paid only from the time at which the principal was payable.

Mr. *Prescott White*, for the trustee.

Mr. *Cooper* and Mr. *Wigram*, for the heir-at-law and residuary devisee of the settlor.—The circumstance that separate trustees are appointed for the separate terms is strong to shew that the trusts of those terms are not contemporaneous. Maintenance cannot be allowed immediately without interfering with the trusts of the 200 years’ term, and the estate is so small that resort must be had to the timber. It is clear that one term was intended to succeed the other. Besides, the trust in default of appointment is explanatory of all that goes before, and shews that nothing was to be raised under the 1500 years’ term until after the death of the survivor of Charles Andrews the elder and F. W. Gough. The proviso at the end of that clause extends both to the appointment and the trust in default of appointment. There is also an express provision, that, if the heirs of the settlor shall after his decease pay the £100 rent-charge, they shall be entitled to receive the *whole* rents for their own use and benefit. Can it be consistent with that pro-

viso in favour of the heir to give an immediate effect to the clause for maintenance? The Court will look at the whole settlement in order to arrive at the proper construction of a power: *Mildmay's Case* (a), *Lord Hinchinbroke v. Seymour* (b), *Bristow v. Warde* (c). Moreover, it is submitted, on the authority of *Lord Hinchinbroke v. Seymour*, that the appointment in this case, being for the benefit of the parents rather than that of the children, is in fraud of the power. An unborn child can require no maintenance.

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The VICE-CHANCELLOR.—If I were at liberty to conjecture, I should guess that, if the father and husband had been examined on the subject, before the settlement was executed, the answer ultimately brought out would have been, what has just been contended for the defendant, namely, that neither the principal nor any interest of the £2600 was wished or intended to be raised or paid until after the decease of the survivor of the father and the husband. But there is no application to correct the settlement on the ground of mistake, and I must deal with the words as I find them. On the words, I am sorry to say that I have no doubt. The term of 1500 years, which is not to wait for its commencement until after the decease of each or either of Mr. and Mrs. Gough, except as that may be considered included in the circumstance that it is to wait for its commencement till the determination of the term of 200 years, is limited to the trustees upon trust that they “do and shall, after the decease of Charles Andrews the elder, levy and raise” &c. Now, I agree, it is not here said “*immediately* after the decease;” but it is to be raised “subject and without prejudice to the yearly rent-charge, or sum of £100 hereinbefore limited in use” to the trustees during the lives of the husband and wife, and the

(a) 1 Rep. 175.

(b) 1 Bro. C. C. 395.

(c) 2 Ves. jun. 336.

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survivor of them. Now, what was the use of so saying, if the sum was not to be raised until after the annuity was gone? If the parties thought about anything when this language was used, they must have thought that the money might be raised at the time when the annuity was subsisting. They are to raise by mortgage or out of the rents "the sum of £2600 in trust for all and every the child and children" of the marriage, "or any such one or more of them exclusive of the other or others of them, to be paid to such child or children at such days or times, and in such shares and proportions, (in case there should be more children than one), in such manner and form, and with such provisoes, conditions, and limitations over," and "with such annual or other sum or sums of money for the maintenance of such child or children"—not *after*, but—"from and after the decease of the said Charles Andrews the elder," until their shares shall become payable, as the husband and wife shall jointly appoint—not as the survivor shall appoint, and, therefore, not as by any will, but—as the husband and wife shall jointly appoint; in default of appointment, equally in an ordinary way; and then the name of the husband occurs for the first time as that of a person who was to die before the money was to be payable, but here, even, the wife is not mentioned. Now, eccentric as some of the terms may be, I cannot refuse to construe the language upon ordinary principles, and I must hold, that, whatever they may have intended in case no appointment should be made, yet by appointment the husband and wife had the power of raising this money, even during their joint lives, and giving interest immediately; that is, after the father's death. The provision is eccentric I agree, and it may not have been what they verbally agreed on, or verbally understood. It is then said, and the argument is one deserving of some attention, that the settlor, in declaring the trusts of the

term of 200 years, directs, that, after payment of the annuity of £100, the residue of the rents shall be paid to the heirs or assigns of Charles Andrews the elder. That I must understand to mean merely that the trusts of the term were not to be exercised further than the purposes of the annuity required. Upon the whole I must declare, that, according to the settlement, the sum of £2600 is now a charge on the Lynch Farm, with interest not from the death of the settlor, but from the time mentioned in the appointment.

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Another question in the cause arose under the following circumstances :—

The bill alleged, and it was admitted at the bar, that the estate comprised in the settlement was not sufficient to pay, in addition to certain other charges, the rent-charge of £100 a year, and also interest at £4 per cent. on the sum of £2600, and it was therefore made part of the plaintiff's case that the deficiency should be supplied out of the residue of the personal estate and the real estate which passed by the will of Charles Andrews the elder; the suggestion being that the effect of the will was to charge the £2600 and interest on the personalty, and the devised lands, as well as the settled lands.

Charles Andrews the elder, by his will, dated in July, 1836, gave and bequeathed to his wife £60 a year for her life, out of his estates in the parishes of Leysters and Middleton-on-the-Hill, in the county of Hereford, and bequeathed to her the free use and occupation of his mes-

A person upon the marriage of his daughter charged certain lands in B. with the payment of an annual sum of money, for the maintenance of the issue of the marriage. The lands were not of sufficient value for the payment of that sum and other prior annual charges. The settlor afterwards by his will bequeathed an annuity to his wife out of lands in L., and gave various legacies; and subject to the said annuity and legacies, and also subject to the

payment of all monies secured by deed of settlement on his daughter, and also subject to his just debts, funeral and testamentary expenses, he gave, devised, and bequeathed all his estates situate in the several parishes of B., L., and M., to his only son in fee:—*Held*, that the effect of the will was not to charge any other estates for the benefit of the issue of the daughter than those which were already charged by the settlement.

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suage called the Bank, in the parish of Brimfield, for life, such annuity and bequest to be in lieu of dower, with remainder to his daughter Ann for life; and he bequeathed to his daughter Ann £400, exclusive of what she might be entitled to under her marriage settlement, and £400 to the plaintiff. And, subject to the before-mentioned annuity and legacies and bequests, and also subject to the payment of all monies secured by deed of settlement on his daughter Ann, and the remedies for recovery thereof; and also subject to the payment of his just debts, funeral and testamentary expenses, and the expenses of proving his will, he gave, devised, and bequeathed all his estates, farms, lands, hereditaments, and premises, with their and every of their appurtenances, situate in the several parishes of Brimfield, Little Hereford, Leysters, and Middleton-on-the-Hill, all in the said county of Hereford, and all other his real and personal estate that he might die possessed of or be entitled unto at the time of his death, (except the household goods, furniture, and other effects in and about his dwelling-house called the Bank, with the live stock, and which his said wife was to have the free use of so long as she lived; and after her decease he gave the same to his daughter Ann to her sole and separate use, free from the debts, control, or engagements of her present or any future husband), unto his only son the said Charles Andrews, his heirs and assigns for ever. And he nominated and appointed his said son Charles Andrews to be executor of his will.

The plaintiff's counsel contended, that the words "subject to the payment of all monies secured by deed of settlement," &c., amounted to a charge of those monies upon all the property comprised in the will.

The counsel for Charles Andrews contended, that those

words amounted to a mere recognition of the charge as it existed: and did not extend the charge to the other estates mentioned in the will: *Serle v. St. Eloy* (a), *Symons v. James* (b).

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THE VICE-CHANCELLOR.—If the testator had thus referred to a mortgage affecting part of the property, (but not being his own debt), I think, upon authority and principle, that it would have been recognition and not charge. I think it not the less recognition nor the more a charge, because the reference here, in the language which he has used, is to such a settlement as that made on the daughter and her children. I must, therefore, dismiss the bill, so far as it seeks to affect the personal estate and real estate of the testator not comprised in the term of 1500 years.

DISMISS so much of the bill as seeks to charge the £2600 on the devised estate, without costs. Declare, that the plaintiff and the other children of the defendant Gough and wife are entitled to interest at £4 per cent. on the £2600 from the date of the appointment, raiseable by sale or mortgage of the 1500 years' term in the Lynch Farm, if the rents are insufficient. Declare, that the costs of the defendant, (*the trustee*), as between solicitor and client, are raiseable in like manner, to be taxed if the parties differ. Costs of all other parties except the defendant Charles Andrews to be paid out of the £2600 and interest. Reserve further directions. Liberty to apply.

(a) 2 P. W. 386.

(b) 2 Y. & C. C. C. 301.

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JOSEPH BRIDGET v. WILLIAM HAMES and JOSEPH
TRUEMAN.

Bill by trustee
against one of
several *cestui
que trusts* to
recover the
trust securities.
The other
*cestui que
trusts* are un-
necessary par-
ties.

THE bill alleged, that, by an indenture executed previously to the marriage of the defendant Hames with Lydia Bridget, £1000, being part of the intended wife's fortune under the will of her father, which fortune was unascertained and outstanding upon real and personal securities, was duly assigned to the plaintiff and the defendant Trueman upon certain trusts for the benefit of the intended wife and the issue of the marriage, with a limitation in favour of the husband in the event of his surviving the wife, and there being no children of the marriage; and that the indenture gave power to the trustees to lay out the trust money on government or real securities, and to vary the securities; that the marriage was solemnized soon after the date of the indenture; that Trueman declined to join in the trusts; that the £1000 was paid to the plaintiff; that the plaintiff, having confidence in Hames, who was an attorney, employed him to obtain proper mortgage securities for the trust money, and handed the money over to him for that purpose; that two mortgages were effected for the respective sums of £450 and £550, and the deeds handed over to the plaintiff; that Hames afterwards applied to the plaintiff for the mortgage-deeds, with a view to calling in the mortgage-money; that the plaintiff gave up the deeds to him upon his express undertaking to call in the mortgage-money and pay the plaintiff the amount, or deliver to him some good and valid securities for the same; that Hames nevertheless did not call in the mortgage-monies pursuant to his undertaking, but retained the securities in his possession, and had entered into some contract for the purchase of the lands comprised in the £550 mortgage, and had taken a conveyance thereof; and that he refused to pay the plaintiff the

said several sums of £550 and £450, or to deliver up the securities to him.

The bill prayed that the defendant Hames might be decreed to deliver up the mortgage-deeds, or pay the money.

The defendant Hames by his answers admitted the material allegations of the bill.

The defendant Trueman put in an answer and disclaimer.

It appeared that there were children of the marriage.

Upon the cause coming on for hearing,

Mr. *Wigram*, (with whom was Mr. *Howes*), for the defendant Hames, objected that the money ought to be paid into Court in a suit to which the children were parties.

Mr. *Anderdon* and Mr *Walford*, for the plaintiff, cited *Franco v. Franco* (a) and *May v. Selby* (b).

Mr. *Wood*, for the defendant Trueman.

The VICE-CHANCELLOR overruled the objection, observing that the wife and children could have liberty to make such application in the suit as they might be advised.

(a) 3 Ves. 75.

(b) 1 Y. & C. C. C. 235; see *Robinson v. Evans*, 7 Jur. 738.

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MIDLAND COUNTIES RAILWAY COMPANY v. OSWIN.

A railway company having, under their act of Parliament, power to contract with incapacitated persons for the purchase of lands, and a right, upon payment of the purchase-money into the Bank, to the fee-simple of the purchased lands, contracted with an incapacitated person, who died before the purchase-money was paid:—*Held*, that the title of the company could not be completed without the assistance of a court of equity.

A bequest of "money, goods, chattels, estates, and effects" held to pass real estate.

BY the stat. 6 & 7 *Will.* 4, c. lxxviii, s. 6, the Midland Counties Railway Company were empowered to make and maintain their railway in, upon, and across certain lands delineated in the plan therein referred to; and by the 11th section of the act they were empowered to enter in and upon the lands of any person or corporation whatsoever, to survey and take levels of the same, or any part thereof, and to set out and appropriate for the purposes of the act such part thereof as they were by the act empowered to take or use, &c. By the 13th section they were empowered to treat and agree for the purchase of any land authorized to be taken and used by them as aforesaid, &c. And by the 14th section, after any land intended to be taken and used for the purposes of the act should have been set out and ascertained by the company, it was made lawful for all corporations, tenants in tail or for life, &c., trustees on behalf of their *cestui que trusts*, whether infants &c., femmes covert, &c., and for *all other persons whomsoever* seised or possessed of or interested in any such lands, to contract for sale of, and convey the same, or any part thereof, to the company.

By the 31st section it was enacted, that, for settling all differences that might arise between the company and the several owners and occupiers of, or persons interested in, any lands which might be taken, used, and damaged, or injuriously affected by the execution of any of the powers thereby granted, if any person so interested or entitled and capacitated to sell, agree, convey, or release as therein aforesaid, should not agree with the said company as to the amount of such purchase-money, satisfaction, recompense, or other compensation as aforesaid, or should, for the space of twenty-one days next after notice in writing, under the

seal of the company, or signed by a director, should have been given to any of such persons respectively, or left at his last or usual place of abode, &c., neglect or refuse to treat, or should not agree, with the company for the sale, conveyance, or release of their respective estates or interests, or the respective estates or interests which they respectively were thereby capacitated to convey therein, or should by reason of absence be prevented from treating, or should *by reason of any impediment or disability (whether provided for by the said act or not) be incapable of making such agreement, conveyance, or release* as should be necessary or expedient for enabling the company to take such lands, or to proceed in making the said railway and other the works aforesaid, or in any other case where agreement for compensation for damages incurred in the execution of the said act, or for the purchase of lands, could not be made, then and in every such case the said company should, and they were thereby required from time to time to issue a warrant to the sheriff or coroner, commanding him to summon a jury to inquire as to the sum of money to be paid for the purchase-money for the lands to be so taken, and the money to be paid for damages; and the verdict of the jury and the judgment of the sheriff thereupon was to be binding and conclusive on all parties.

The 39th section enacted, that, upon payment or tender of the money which should have been contracted or agreed for, or assessed by any jury in manner aforesaid, or if the persons entitled or interested as aforesaid, or any of them, could not be found, or should be absent, or should refuse, neglect, or be unable to make a good title to the satisfaction of the company, or if any party entitled to convey such lands should refuse, neglect, or be unable to convey, then, upon payment of the money into the Bank as after mentioned, it should be lawful for the company to enter upon the lands, and thereupon the fee-simple and inheritance there-

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of, &c. should be vested in and become the sole property of the company for the purposes of the act.

The 44th section contained the usual provision, that the purchase-money to be paid for the lands of incapacitated persons should, if it exceeded £200, be paid into Court, to be applied either in the redemption of the land-tax, the discharge of incumbrances, or the purchase of other lands to be settled to the like uses.

In December, 1838, notice in writing under the hand of one of the directors of the company was duly served on Thomas Oswin, or left at his place of abode, to the effect that a piece of land, of which he was then seised in fee-simple, would be required to be taken and used by the company for the purposes of their act, and that it was the intention of the company to treat and agree for the purchase thereof, &c. Thomas Oswin, being at that time and ever afterwards of weak mind, neglected to treat or agree with the company for the sale or conveyance of the piece of land in question. They, accordingly, in April following, duly served on him another notice in writing, which was also under the hand of a director, to the effect that a jury would be summoned &c., according to the provisions of the act, to inquire and assess, and give a verdict for the sum of money to be paid for the purchase of the piece of land, and for the damage. In pursuance of the above notice, an inquisition was duly taken at Leicester, on the 9th April, 1839, when the jury found that £300 was the sum to be paid by the company to Thomas Oswin for the purchase-money of the land, and £140 by way of compensation for damage.

Under these circumstances the company took possession of the land, but, before the purchase-money was paid, and in the month of October, 1839, Thomas Oswin died, having by his will, dated in September, 1835, at which time he was of sound mind, devised and bequeathed as follows :—

"I give and bequeath to my loving wife Mary Oswin, all my money, goods, chattels, estates, and effects, of what nature or kind soever, and wheresoever the same may be found at the time of my decease, for the natural term of her the said Mary Oswin's life; and at the decease of my said wife, all my property of goods, money, chattels, estate, or effects whatsoever, to be equally divided between all my children living at the time of her decease." And the testator appointed his said wife Mary Oswin sole executrix of his will.

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The testator left surviving him his wife Mary Oswin and two children, a daughter and a son, both of whom were infants. Mary Oswin proved the will in the Arch-deaconry Court of Leicester, in January, 1840.

At the time of the testator's death, the land in question, together with other land of the testator, was mortgaged for a term of years to secure £230 and interest.

The bill, which was filed against the executrix and the two infants, prayed that it might be declared, that, upon payment of the sum of £440 to the proper parties, the company were entitled to a conveyance of the land; that the company, out of the before-mentioned sum, might be at liberty to pay the mortgagees and take an assignment of the term; that the rights of all parties interested in the residue of that sum might be declared; and that, upon payment of such residue, the defendants, or some or one of them, might be decreed to convey the property to the plaintiffs, the infants conveying under the provisions of the stat. 11 Geo. 4 & 1 Will. 4, c. 60.

The cause now came on for hearing.

Mr. *James Parker*, for the plaintiff, said, that since the death of Oswin the company could not complete their title to the land under the act of Parliament, and therefore that the bill was necessary.

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This point was not disputed by the defendants and was adjudged in favour of the plaintiffs (a).

With reference to the rights of parties interested in the purchase-money, a question was then argued upon the construction of the will.

Mr. *Glasse*, for the defendant Mary Oswin, contended that the word “estates,” though associated with “goods, chattels, and effects,” was sufficient to pass the real estate: *Wills v. Wills* (b), *Saumarez v. Saumarez* (c). [The Vice-Chancellor referred to *Doe d. Wall v. Langlands* (d) and *Roe d. Helling v. Yeud* (e).]

Mr. *Wray*, for the heir-at-law, contended that the word “estates” could not operate to pass the real estate of the testator, as he had only one real estate. And the word “estate” in the latter part of the will could not have that effect, inasmuch as it was coupled with words applicable to personalty only: *Doe d. Bunny v. Rout* (f), *Henderson v. Farbridge* (g), *Thomas v. Phelps* (h).

THE VICE-CHANCELLOR.—It lies in the first instance upon those who say that the real estate has not descended, to shew that it has not descended; but when they produce a will, properly executed and attested, purporting to give all the testator’s money, goods, chattels, estates, and effects, the burthen is shifted, and it lies upon those who say that the

(a) See <i>Midland Counties Railway Co. v. Westcomb</i> , 11 Sim. 57.	2 Chit. 558. <i>Jongsma v. Jongsma</i> , 1 Cox, 362.
(b) 1 Dr. & W. 444.	(e) 2 N. R. 214.
(c) 4 Myl. & C. 331.	(f) 7 Taunt. 79.
(d) 14 East, 370. For cases involving the word “estates,” see <i>Fletcher v. Smiton</i> , 2 T. R. 656;	(g) 1 Russ. 479.
	(h) 4 Russ. 348.

real estate is not included in the will to shew that it is not included. I apprehend, that in this case the burthen is shifted, and that it is for the heir to shew that the proper construction of the will is the limited construction of the general words. I have always considered that the rule in these cases could not be better expressed than it is by Lord *Eldon* in *Church v. Mundy* (a), where he says, "I am strongly influenced towards the opinion, that a court of justice is not by conjecture to take out of the effect of general words property which those words are always considered as comprehending." And a little lower down,—“The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary; and surely that is the safest course, where, as there is no other subject to which they can be applied, the testator must, if he does not mean that, be considered as having no meaning.” Now, in the present case, all the words are general expressions. The word “money” is the only word as to which the propriety of that description might be doubtful; but even that word, in its common use by mankind, is more a general than a specific expression. The next consideration is, that, unless the realty be included under the words “estate” and “estates,” those words are mere superfluities, for the words “goods, chattels, and effects” would of themselves carry the personalty. This is the will of an unlearned man, and I think that I should act against the soundest rules of construction, if I were to hold the general words “estates” and “estate” to be limited by the other words. I must, therefore, hold, that the real estate passes by the will.

DECLARE, that, according to the true construction of the testator's will, the real estate of which he was seised at the time of the date and execution of his will, and at the time of his death, passed under it, if the same

(a) 15 Ves. 406.

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was executed and attested (a) as by law was then required for the devise of freehold estates, and declare the wife and children trustees for the company of the real estate, but without prejudice to any question between the son and the mother and the sister, as to the execution and attestation of the will.

In the absence of special clauses for that purpose, the effect of a railway act is not to alter the course of devolution of property without the consent of the owner; and therefore, if a company, by virtue of their act, contract with an incapacitated person for the purchase of lands, the purchase-money is to be considered as real and not as personal estate.

Another point was then submitted to the Court by consent of all parties, in order to save the expense of a petition.

Mr. *Glasse*, for the executrix, submitted, that, under the circumstances of the case, the property must be considered as having been converted into personalty from the moment of the delivery of the verdict of the jury. He referred to the 44th section of the act. He also cited *Ex parte Hawkins* (b) and *Salmon v. Randall* (c).

The VICE-CHANCELLOR.—My present impression is, that, upon a reasonable construction of the whole act, though there are no words precisely and clearly applicable to the case, it was not intended to change the nature or quality, in point of devolution, of any man's property who was incapable of consenting. Consequently, in the case of a lunatic, if his property could be effectually taken from him, it could not be so taken from him as to change the course

(a) The Master had found the will to be duly executed and attested, but it had not been proved in the cause.

(b) In Chan., M. T., 1843. (From Mr. Goldsmith's note). In that case, Henry Hawkins contracted to sell certain freehold property to the Corporation of London, under the London Bridge Improvement Act; but died before

any conveyance was executed. The company took possession, and after Mr. Hawkins's death paid the purchase-money into the Bank. The question was, whether the money belonged to the real or the personal representative of Hawkins, and the *Vice-Chancellor of England* held that it went to the latter.

(c) 3 Myl. & Cr. 439.

of devolution. No one disputed the proceedings during Thomas Oswin's life, and I think that I may take the property as bound by them, but not so bound as to change that course.

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THOMPSON v. COOPER.

Feb. 17th.

THIS was a suit instituted by a creditor on behalf of himself and all other creditors of Samuel Porter, who died intestate, against his administrator, for an account of the personal estate of the intestate, and the payment of his debts.

The defendant, by his answer, claimed a right of retainer, in respect of a sum due to him on his own account as a creditor of the intestate, and also in respect of a sum due to him as executor of James Caven (*a*), who was a creditor of the intestate.

The plaintiff, without amending his bill, replied to the answer, and obtained at the hearing the common decree, directing the accounts to be taken in the usual way, and the assets to be applied in a due course of administration in payment of the intestate's debts; the decree contained a direction that the parties should produce on oath all books, &c. in their custody relating to the matters aforesaid, and were to be examined on interrogatories as the Master should direct; with liberty to the Master to state special circumstances.

Upon taking the accounts before the Master, the defendant, in his discharge, credited himself with the amount of the sums in respect of which he claimed a right of retainer. The plaintiff then, with a view to prove that the

Under the common decree in a suit by creditors against an administrator—*Held*, upon the authority of *Spicer v. James*, 2 Myl. & K. 387, that the Master had no jurisdiction to decide and report upon a question of retainer, the claim as to which had been set up by the defendant in his answer, but was disputed by the plaintiff.

(*a*) See *post*, p. 85.

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defendant had entered into an agreement to waive his right of retainer, insisted that the defendant should be directed to produce certain documents, (not mentioned in the schedule to his answer), and also to submit to a *vivâ voce* examination. The Master was of opinion, that he had no power, under the decree, to enter into the question of retainer in this form; but, upon the ground that he had liberty under the decree to state special circumstances, he gave the plaintiff leave to bring in a state of facts, and to exhibit interrogatories for the examination of the defendant on the subject. The plaintiff accordingly (the Master having in the meantime allowed the discharge) exhibited several special interrogatories for the defendant's examination, four of which were allowed by the Master.

The interrogatories were addressed to the questions, whether the defendant had or had not applied for, and obtained, letters of administration of the estate and effects of the intestate, at the request, or with the consent, of the creditors of the intestate, for the general behoof of all the creditors; whether or not, at or before the time of his applying for or obtaining such letters of administration, he had any correspondence or communication with the creditors, or with the father and brother of the intestate, in relation to his applying for or obtaining such letters of administration for the general benefit or behoof of the creditors; whether or not, previously to his applying for or obtaining such letters of administration, he had any arrangement or agreement with the creditors, or the other persons named, as to the distribution of the intestate's estate; and whether or not, and when, it had been agreed and arranged between himself and the creditors and other persons, that the estate and effects of the intestate should be divided or distributed among the creditors rateably and in proportion to their several and respective debts or demands, without any preference or retainer, by or on the part of himself or any other creditor.

To the certificate of the Master, allowing these interrogatories, the defendant took an exception, and now—

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Mr. *Pryor*, in support of the exception, cited *Spicer v. James* (a), *Moore v. Langford* (b), and *Hopkinson v. Bagster* (c). [The *Vice-Chancellor*.—It is not, I think, the usual course to frame an interrogatory for the production of documents. The defendant can be required to state, by affidavit, what documents are in his possession.]

Mr. *Russell* and Mr. *Shebbeare*, *contrà*, contended, that this was a case in which an interrogatory as to the documents in possession of the party was right, more especially as the plaintiff's knowledge of the existence of such documents was acquired since the parties had been in the Master's Office, no trace of such documents appearing in the defendant's answer. In support of the interrogatories generally, they relied on the fact, that under the decree the Master had liberty to state special circumstances, which did not appear to have been the case in *Spicer v. James*.

Upon the *Vice-Chancellor* inquiring of the defendant's counsel, whether the Master intended to review his allowance of the defendant's discharge, the answer given was in the negative.

THE VICE-CHANCELLOR.—The question is not, whether the defendant shall be allowed to pass through and out of this case without an investigation of the subject-matter of his discharge, but whether these interrogatories, in the form in which they now stand, ought to be allowed. It is probable that the decree in the case of *Spicer v. James* did not contain any direction to report any circumstances specially; but I must suppose that it did contain a direction to make

(a) 2 Myl. & K. 387. (b) 6 Sim. 323. (c) 1 Y. & C. C. C. 13.

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to the parties all just allowances, and I do not consider myself at liberty to act in contradiction to that case. It seems to me to bear considerably upon the present; but even if it does not, the object of these interrogatories is, in substance, to take away from the defendant the right of retainer claimed by him. That right of retainer has, however, been conceded to him by the Master's allowance of the discharge allowed on the 8th December, 1843; whereas the present interrogatories, on which the Master cannot act except by reviewing and altering that discharge, were not allowed until after that time, for the Master's certificate allowing the interrogatories is dated the 17th of January, 1844. It has been stated to me at the bar, and not contradicted, that the Master has declared his intention not to review the discharge. In this state of circumstances, it appears to me, that, to enter into an inquiry as to collateral facts, for the purpose of informing the Court of a certain matter, was an act exceeding the Master's functions. I regret that I am compelled to come to that conclusion, as possibly it would have been a convenient mode of obtaining information which probably must come out at some stage of the cause. The defendant, however, is entitled to take the opinion of the Court whether these interrogatories are regular or irregular, and I am of opinion, both upon principle and authority, that they are irregular; that is to say, they are either wholly wrong, or contain too much.

Exception allowed.

The plaintiff afterwards presented a petition (supported by affidavit) setting out a correspondence between the defendant's attorney and the father of the intestate, from which it appeared to have been arranged that the father should give up administration of his son's effects to the defendant and James Caven, deceased, "for the interest of his" (the intestate's) "creditors in general," &c., and stat-

ing that the plaintiff was not aware of the correspondence until after the decree had been made in this suit.

The petition prayed for an inquiry as to the alleged agreement for retainer, an inquiry as to all balances which at any time or times might have been in the defendant's hands, an account of the intestate's estate, for liberty to examine the defendant *vivâ voce*, &c., and for general relief.

The VICE-CHANCELLOR considered himself bound by the authority of *Spicer v. James* to hold that the question raised by the petition could not be entered into before the Master under the common decree in a creditors' suit. The petition, therefore, must be dismissed without costs, or the petitioner might have liberty to present a petition of re-hearing (a), in which case the present petition might stand over and be heard with it.

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The Master afterwards made his report, from which it appeared that he had disallowed the retainer in respect of both debts. Upon the argument of exceptions taken to his report by the defendant,

July 9th.

The personal representative of A. has a right of retainer in respect of a sum due to him from A.'s estate as personal representative of B.

Mr. Koe and Mr. Pryor, in support of the exceptions, cited *Burnet v. Dixe* (b), as shewing that the claim of retainer in respect of the debt due to Caven was maintainable.

Mr. Russell and Mr. Shebbeare, *contrâ*, contended, that the retainer in respect of that debt could not be allowed; because Caven survived the intestate, and might have enforced the debt himself.

(a) See *Shipbrooke v. Hinchinbrook*, 13 Ves. 394; *Brookfield v. Bradley*, 2 S. & S. 64; *Le Grand v. Whitehead*, 1 Russ. 309; *Gar-*

land v. Littlewood, 1 Beav. 527.

(b) 1 Roll. Abr. 922; 2 Brownl. 50. See *Plumer v. Marchant*, 3 Burr. 1380.

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July 10th.

The VICE-CHANCELLOR said, that he thought, both on principle and authority, the retainer must be allowed in respect of both sums.

Feb. 23rd.

READ v. WILLIS.

Bequest of £1000 to A. S., and the children that may be lawfully begotten of her body. A. S., being unmarried at the death of the testatrix, takes the legacy absolutely.

MARY FISHER, by her will, gave the sum of £1000, of which she had the right of disposal under the will of her husband, to her cousin Ann Sumpter, or whatever her name might be at the time of her, the testatrix's, decease; and she also gave and bequeathed to the aforesaid Ann Sumpter, and to the children that might be lawfully begotten of her body, £1000, upon condition that the said Ann Sumpter, or whatever her name might be at the time of her, the testatrix's, decease, should pay 7s. per week out of the interest of it to testatrix's brother, John Wright, during his life, and £5 a year to Ann Richardson when she should be past getting her living.

At the time of the death of the testatrix, Ann Sumpter was unmarried: she afterwards married, and had children, who were made parties to the suit.

The question was, what interest Ann Sumpter took in the second-mentioned £1000.

Mr. *Russell* and Mr. *Shebbeare*, for the plaintiffs.

Mr. *Wigram* and Mr. *Ward*, for the defendants, the children, relied on *Morse v. Morse* (a) and *Crawford v. Trotter* (b).

Mr. *Swanston*, for the trustees.

(a) 2 Sim. 485.

(b) 4 Madd. 361.

Wild's case (a) and *Vaughan v. Marquis of Headford* (b) were mentioned.

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The VICE-CHANCELLOR.—I think, that, as Ann Sumpter never married till after the death of Mary Fisher, she took an absolute interest in the second £1000.

(a) 6 Rep. 18. Bequest of personality to A. and his children; see *Cook v. Cook*, 2 Vern. 545; and see 2 Atk. 221; 1 P. W. 665; *Pyne v. Franklin*, 5 Sim. 458; *De Witte v. De Witte*, 11 Sim. 41; *French v. French*, Id. 257. Devise to A. for life, and “after his death” to his children; *Ginger v. White*, Willes,

348. Dying “without children,” *Hughes v. Sayer*, 1 P. W. 534; “without having” children, *Bell v. Phyn*, 7 Ves. 459; *Wall v. Tomlinson*, 16 Ves. 413; *Weakley d. Knight v. Rugg*, 7 T. R. 322; *Stone v. Maule*, 2 Sim. 490.

(b) 10 Sim. 639.

HOWARD v. CONWAY.

Feb. 27th.

BY articles dated in November, 1784, and made in contemplation of the marriage of John Conway Conway with Mary Elizabeth Lloyd, reciting that, under the will of her father, Mary Elizabeth Lloyd was entitled to a certain fortune, but that, by reason of her father's debts, it would be much diminished, and probably not exceed £2000, it was witnessed, that, in consideration of the marriage &c., John Conway Conway covenanted, in case the marriage took effect, to settle certain lands to the use of himself for life, and then to the use that the intended wife should receive a jointure of £150 out of the premises, with remainder to the use of the first son of the marriage in tail, with remainders over. Then followed clauses for the diminution of the jointure in case there were younger children,

Devise of estates to A. upon condition that A. should release, in favour of her brother B., all A.'s interest in £1000 “charged upon certain estates, limited by the marriage settlement” of the father and mother of A. and B; the sum of £1000 was comprehended in the settlement, and A. took an interest in it, but it was not charged on any estates:—*Held*, nevertheless, that it was the sum referred to in the will.

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of the estate of these children. The trustees then con-
tained a joint and several covenant on the part of the in-
ferred persons and wife that as soon as the intended
will should be received, I should be paid into the
hands of the trustees of the settlement, upon the bank
that should be given, not less than the sum of
£1000 to be paid to me by the trustees of the settlement, and to
pay the same out of interest and pay the very interest
and income thereof to J. C. Conway and his assigns for
his life and after his decease it and the same should be paid
to the trustees, or some of them, and one of them if there
should be children, to pay him during the said term of £1000
to him during all his life, and such child and children, either
then and then such child or any son, or such one of
them, and if such child, son, or any other person, should
then be, as the said J. C. Conway should be paid, or will
pay, and it is intent of my said appointment, that to
the money such child and children, either then and except
such child or any son, equally, share and share alike, if
more than one, and if but one, then wholly to such one
child, the same to be paid and payable to such child and
children respectively until and as they should reach the
age of twenty-one years, with such interest of survivorship
between if more than one as therein mentioned, and as to
the residue of the said portion, after deducting the said
sum of £1000, to pay the same to the said J. C. Conway,
his executors, administrators, or assigns.

The marriage took effect, and there were two children of the marriage viz. namely, a daughter, Susannah Benedicta, and a son, Benjamin. The daughter attained twenty-one in the year 1814.

Mrs. Conway. by her will, made in pursuance of a power vested in her for that purpose. After reciting that by virtue of certain indentures she had power to appoint one individual moiety of the freehold and leasehold property mentioned in the second schedule to her will, and that she

was entitled for life under the will of her mother, Dorothea Lloyd, to certain lands in Lower Soughton, &c. for life, with remainder to her son and daughter, their heirs and assigns, in equal shares; and reciting that, *in and by her marriage articles, her said daughter Susanna Benedicta was entitled to the sum of £1000 charged upon certain estates therein limited*, she, the said Mary Elizabeth Conway, in pursuance and exercise of the said power, &c., did thereby appoint and devise all that her undivided moiety of the property contained in the schedule unto her husband the said John Conway Conway, and his assigns, for his life; and from and after his decease, she directed, limited, and appointed, gave, devised, and bequeathed, (on that express condition, nevertheless, that her said daughter Susanna Benedicta, her heirs, executors, administrators, and assigns, relinquished, exonerated, and released in favour of her said son Benjamin Conway, his heirs, executors, administrators, and assigns, all and every, or other, right, title, and claim whatsoever of, in, and to the devise or bequest of her said late grandmother, the said Dorothea Lloyd, to her the said testatrix's said daughter in the aforesaid lands in Lower Soughton, &c., *and also in and to the aforesaid charge of £1000, and every part of the same respectively*), all that her said one undivided moiety or equal half part or share of and in the property contained in the schedule unto Holland Griffith and Henry Jones and their heirs, to the use of her said daughter Susanna Benedicta, and her assigns, for her life, with remainder to the use of the first and other sons of Susanna Benedicta successively in tail, with divers remainders over.

Mrs. Conway died soon after the date of her will, leaving her husband, son, and daughter surviving her.

Mr. Conway, the father, received upwards of £1000 in respect of his wife's fortune, but did not invest £1000 on the trusts of the settlement, and died in 1836, leaving his

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(CHARGE OF THE PROBATE, jointly with Henry Jones) and his BENEFICIARY SETTLEMENT. — AND SHE MADE HER EXECUTRIX AND EXECUTOR HER SON, WHO REPRESENTED THE SUM OF £1000 OUT OF THE ASSETS IN RESPECT OF THE SETTLEMENT.

IN 1855 SUMNER BENEDICTA MARRIED ROBERT HOWARD.

THE ISSUE OF THE WILL, WHICH WAS MADE BY MR. AND MRS. HOWARD AGAINST BENJAMIN C. CONWAY AND HENRY JONES, WAS TO OBTAIN A DECISION FROM THE COURT AS TO WHETHER, BY THE WORDS "£1000" CHARGED UPON CERTAIN ESTATES THEREIN LIMITED, MRS. CONWAY INTENDED THE £1000 COVENANTED TO BE SETTLED BY MR. CONWAY.

MR. RUSSELL AND MR. LING FOR THE PLAINTIFFS.—THE SUM OF £1000 MENTIONED IN THE SETTLEMENT IS A SUM IN GROSS, AND NOT CHARGED UPON OR CONNECTED WITH THE ESTATES LIMITED BY THE SETTLEMENT. THE QUESTION IS, WHETHER MRS. CONWAY INTENDED TO BENEFIT HER SON TO THE EXTENT OF THIS £1000, IF IT WAS NOT A CHARGE ON THE ESTATE. WE SUBMIT, FIRST, THAT THE EXPRESSION IN THE RECITAL OF HER WILL IMPORTS A CHARGE; AND, SECONDLY, THAT, WHEN SHE DIRECTS A TRANSFER OF THE £1000 FROM ONE CHILD TO THE OTHER, SHE RETAINS THE NOTION OF DELIVERING THE PROPERTY FROM SOME BURDEN. AS IT IS NOT CHARGED, THERE IS AN END OF THE BENEFIT, WHICH WAS ONLY INTENDED CONDITIONALLY.

MR. BACON, FOR ONE OF THE EXECUTORS OF MR. CONWAY.—ALL THE TESTATRIX MEANT TO GIVE THE SON WAS, AN EXONERATION OF THE ESTATE.

MR. WYLLIE AND MR. BENEDICT CHAPMAN, FOR THE DEFENDANT CONWAY.

THE VICE-CHANCELLOR.—THIS IS MERELY MATTER OF ERRONEOUS DESCRIPTION. THE TESTATRIX, GIVING CERTAIN BENEFITS TO HER DAUGHTER, AND WISHING HER NOT TO TAKE THIS SUM OF

£1000 out of the family, as thinking her already sufficiently portioned, but considering it to be a charge on the estate of the testatrix's son, directs that the daughter shall release in favour of the brother. It would be an erroneous construction of the will, to say, that the circumstance of its being a charge on the estate was conditional to the gift. She meant the son's estate to be benefited at the daughter's expense; from what source is immaterial. She meant the £1000, given to the daughter by the settlement, to go to the brother. She has not said it accurately, but she has said it sufficiently.

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DECLARE, that, by the sum of £1000 described in the will of Mary Elizabeth Conway as "the sum of £1000 charged upon certain estates therein limited," was meant and intended the sum of £1000 the trusts whereof were declared by the articles of November 22nd, 1784, in the pleadings mentioned.

WHITMORE v. OXBORROW.

Jan. 18th.

AFTER the decree in this suit (a), both the plaintiff and the defendant became bankrupt. The assignees of the latter were brought before the Court by supplemental bill.

A motion was now made, in the original and supplemental suits, on the part of the defendants, the assignees of Mrs. Oxborrow, that the assignees of the plaintiff might within a fortnight after notice of the motion file a supplemental bill, in the nature of a bill of revivor, against the defendants, the assignees; or that the suit might be dismissed against them with costs.

Assignees of a bankrupt plaintiff (who had become bankrupt after decree) were put to their election to proceed in the suit in the name of the plaintiff; and in default of their so electing, the proceedings were ordered to be stayed until further order.

Mr. Swanston, for the motion.

(a) See 2 Y. & C. C. C. 13.

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Mr. *Terrell*, *contrà*, contended, that the motion, after decree, was irregular.

The VICE-CHANCELLOR made the following order:—

LET the assignees of the plaintiff elect within ten days from this time, whether they will prosecute this suit in the name of the bankrupt plaintiff, and let them give notice of such election to the defendants; and if they shall so elect, let them be at liberty to carry on this suit, and prosecute the same in the name of the plaintiff; but if they shall not so elect, let all further proceedings in this suit be stayed until further order: and in case they shall elect to prosecute this suit as aforesaid, then let them indemnify the plaintiff against all future costs in the suit. Reserve the costs of this application.

The assignees of the plaintiff gave notice that they would prosecute the suit.

Feb. 17th. ROBERT PACKER and SARAH his Wife v. WILLIAM PACKER and Another.

A married woman can waive her equitable right to a settlement out of a fund in Court, to which she has been declared entitled, although the clear amount payable in respect of such fund has not been ascertained.

IN this case, the female plaintiff was the administratrix, and had been reported by the Master to be the sole next of kin of the intestate, Margaret Abondio, for the administration of whose estate the suit was instituted.

The cause was heard in Hilary Term, 1844, on further directions, when the Court ordered the costs of the defendants to be taxed, and paid out of the clear residuary fund in Court, consisting of 714*l.* 11*s.* cash, and the surplus of that fund to be paid to the plaintiffs.

This order was stopped in the Registrar's Office, because Mrs. Packer had not been examined in Court for the purpose of waiving her right to a settlement.

The plaintiffs now presented their petition for payment of the fund, according to the decree, *minus* the costs thereby

ordered to be taxed. No taxation of those costs had been made; and, consequently, the sum eventually payable to the plaintiffs, under the decree, was still unascertained.

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Mr. *Prendergast* having opened the petition,

The VICE-CHANCELLOR intimated a doubt, whether he could proceed to take the consent of the female plaintiff to the order prayed, while the amount of money to be affected by it continued uncertain. But, after communication with the Registrar, his Honor took Mrs. Packer's consent, and made the order in the terms of the prayer of the petition, for payment of the money to both the petitioners.

FYLER v. FYLER.

Feb. 24th.

THIS was a creditors' suit. The decree on the hearing of the cause was made in August, 1840. The Master made his report, stating in a schedule the names of the creditors who had proved their debts before him. Some of these creditors had proved their debts before the orders of August, 1841, came into operation. By the decree made on further directions in August, 1843, it was ordered, that the scheduled creditors generally should receive payment of their debts and *interest*.

Decretal order for payment of interest to creditors generally cannot be varied by confining the payment of interest to particular creditors, without re-hearing.

An application was now made by petition to vary the decree made on further directions, by inserting therein a declaration, that such creditors only (whose debts did not carry interest) as had come in and established their debts since the general orders of August, 1841, came into operation, should be entitled to interest.

Mr. *R. W. E. Forster*, in support of the petition.

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Mr. *Wigram*, *contra*, contended, first, that the variation could not be made without a rehearing; secondly, that the creditors were entitled to the interest, under the 46th Order of August, 1841.

Mr. *Forster* in reply, upon the last point, cited *Trail v. Kibblewhite* (a), in which, he said, the *Vice-Chancellor of England* had decided, that creditors who had taken in their claims before the Master before the 46th Order came into operation, though they might not have established their debts until afterwards, were not within the terms of that order.

The VICE-CHANCELLOR said, that, without giving any opinion on the second point, he was not satisfied that this was a proper cause for varying the decretal order in the matter complained of, without a petition of rehearing. The petition must be dismissed, but he should allow the costs of the application to be costs in the cause, and give no costs to the respondents.

By consent, an order was afterwards taken, according to the prayer of the petition.

(a) 11 Law. Journ., N. S., 248, Chan.

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SAINT KATHERINE DOCK COMPANY v. MANTZGU.

It is not necessary that the answer of a foreigner should be in his own language.

MR. *RUSSELL* and Mr. *Hargrave*, for the plaintiffs, moved, that the answer of the defendant, a Moorish Jew, might be taken off the file. The grounds of the application were,—first, that the answer was in the English language, with which the defendant was unacquainted, and that he

knew the contents of the answer only by means of an interpreter; whereas, upon the authorities, the answer ought to have been in the defendant's own language, with a sworn interpretation: *Hinde Pr.* 228; *Wy. Pr. Reg.* 13; *Harrison Ch. Pr.* (ed. Newland) 175; *Fowl. Ex. Pr.* 428, 430; 2 *Dan. Ch. Pr.* 279; 1 *Smith Ch. Pr.* 265; *Simmonds v. Du Barré (a)*, *Lord Belmore v. Anderson (b)*. Secondly, that there ought to have been an order made upon motion for an interpreter, and he ought to have been sworn before he interpreted the answer to the defendant, which had not been done here: 2 *Dan. Ch. Pr.* 484; 2 *Swanst.* 261, n.; *Anon. (c)* Thirdly, that the signature of the defendant (Millop Mantzgu) to the answer did not correspond with his name (Mogluf Mantzgu) as stated in the body of the answer and in the bill, and that the signature itself was in some instances varied; there would, therefore, be no proof of the identity of the party: *Rex v. Morris (d)*, *Tinker v. Cunningham (e)*. Fourthly, that the jurat was insufficient, as it did not shew that the interrogatories of the bill had been interpreted, that the answer filed was in the same state as when interpreted, or that the plaintiff's clerk in Court was present when it was sworn.

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The jurat was in the following form:—"Sworn at the Record and Writ Clerk's Office, Chancery-lane, in the county of Middlesex, by the defendant, Mogluf Mantzgue, by the interpretation of Benetto Cohen, the said interpreter being first sworn, that he had truly, distinctly, and audibly interpreted the contents of this answer to the defendant, and that he will truly interpret the oath about to be administered to him this 4th day of December, 1843, before me—Seth Charles Ward."

Mr. Berrey, the Clerk of Records and Writs, being exa-

(a) 3 Bro. C. C. 263.

(b) 4 Bro. C. C. 90; 2 Cox,
208.

(c) 1 Vern. 263.

(d) 2 Burr. 1189.

(e) 7 Jurist, 1080.

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mined upon the present motion, said, that it was not the practice to take a foreigner's answer in his own language.

Mr. *Wigram* and Mr. *Hardy*, for the defendant, were stopped by the Court.

The VICE-CHANCELLOR.—With regard to the objection as to the signature, considering the country and nation of the defendant, I think his signature ought to be held sufficient.

With regard to the language of the answer, I am not aware of the existence of any rule that a foreigner, however ignorant of the English language, is bound to put an answer on the file in his own language. If such a rule does not exist, this answer, as far as the language goes, is correct, and the question is confined to the sufficiency of the jurat.

Observations have been made as to the interpreter. He may have been unfit, improper, not trustworthy; but that is only a hypothetical case. No such case is before me, and I am not to assume that he was an incompetent or ignorant person. It is then said (and several very sensible observations have been made on this part of the case) that the jurat is insufficient in respect of certain guards which might and ought to be put on the conscience of the defendant; remarks have also been made upon the legal consequences which might result from this alleged defect; and it does appear to me, that, if the jurat were now to be framed for the first time, an alteration for the better might possibly be made; but I find, that, in the year 1791, a similar case occurred, and the jurat which was used for one of the defendants was not substantially different from the present. There, indeed, the words were, "*through* the interpretation," and here "*by* the interpretation;" but these are the same thing. I believe, that in 1791 the business in the Six Clerks' Office was conducted under the guidance of

persons well versed in the forms of the Court. The jurats of that year are stated by Mr. Berrey to be in the handwriting of Mr. Curson, an experienced officer, who had been thirty years in the office at that period; and the answer was taken before a most experienced member of the bar, Mr. Walker, who, at that time, was Accountant-General or a Master in Chancery. It appears to me, therefore, upon every rational probability, that the proceeding in that case was consistent with the practice and rules of the Court; in addition to which, we have the testimony of an experienced officer, who states, that, in his opinion, it was according to the rules of the Court.

Against all this I am required to make a new decision, upon no other grounds than the statements contained in certain books of practice which appear to me susceptible of the interpretation given to them by Mr. *Smith* (a), but which, if not susceptible of it, are not based upon authority, and are at variance with the statements of a gentleman to whose opinion on such a subject considerable deference is due.

With respect to what has been said upon the supposed difficulty of indicting a defendant for perjury in a case like the present, the defendant has *elected* to answer in a language not his own, and I wish it to be understood, though it is not necessary to give a positive opinion on the subject, that I do not accede to the argument that an indictment could not be sustained in such a case.

(a) 1 Smith, Ch. Pr. 265.

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Feb. 27th.

Trustees were empowered by act of Parliament to sell and exchange all or any of the hereditaments mentioned in the schedule to the act, amongst which was a farm, called the Mountain Farm, parcel of the manor of W. In the body of the act there was a proviso that the manor of W. should not be sold. The trustees having contracted to sell the Mountain Farm:—*Held*, that the purchaser was not bound to accept the title.

EARL OF LINCOLN *v.* ARCEDECKNE.

BY an act of Parliament passed for authorizing the sale and exchange of the real estate devised by the will of the Earl of Rochford, and for other purposes, certain trustees were empowered to sell or exchange all or any of the hereditaments mentioned in the schedule to the act, whether of freehold or copyhold tenure.

The third section of the act contained the following clause:—“ Provided that the mansion-house of William Henry, Earl of Rochford, and the park and lands thereto belonging, which he the said testator occupied therewith, being the lands and hereditaments described in the schedule hereto as ‘Easton Park in hand,’ and the said testator’s manors of Wickham with its members, and Byng, Easton, Letheringham, Martley Hall, Hoo, Kettleburgh, Charsfield, and Hoo Charsfield, shall not, nor shall any part or parts thereof be sold or exchanged under the power of sale and exchange in this act contained.”

By a subsequent section power was given to the tenant for life in possession to lease for twenty-one years all or any part of the hereditaments comprised in the schedule, provided that the said mansion-house of Lord Rochford and the park and lands thereto belonging, which the said testator occupied therewith, and the testator’s manors of Wickham with its members, and Byng, Easton, Letheringham, Martley Hall, Hoo, Kettleburgh, Charsfield, and Hoo Charsfield, or such and so many of them as from time to time should be subject to the trusts and limitations of Lord Rochford’s will and codicils and of the act, or any of them, should not be demised or leased under that power separately from each other, and that, in every demise or lease to be made of the same, the tenant or lessee thereof should covenant to make the mansion the principal place of the residence of himself and his family, and to keep the same

and the said park and lands in good repair, order, and condition, and to exercise the rights and privileges attached or belonging to the said manors respectively.

Again, by another section of the act power was given to the tenants for life, if of age, or to the trustees, subject to the trusts of the will and of the act, to grant building leases of all or any parts of the hereditaments comprised in the schedule; provided that the said mansion-house of Lord Rochford and the parks and lands thereto belonging, which he the testator occupied therewith, being the lands and hereditaments described in schedule to the act as "Easton Park in hand," and such hereditaments and premises (if any) as the testator had declared by his will should not be demised or leased under the power of leasing in his will contained, separately from each other, or so many and such part or parts thereof as from time to time should be subject to the trusts and limitations of the said will and codicils and of this act, or any of them, should not be demised or leased under that power.

In the schedule of the act was comprised, amongst others, a farm called the Mountain Farm.

It appeared that part of this farm was copyhold of the Manor of Wickham, and that in 1826, the Rev. Charles Davy, who was then owner of the farm, contracted to sell it to Lord Rochford, the then lord of the manor, and that accordingly by a surrender dated the 6th April, 1826, Davy surrendered the premises to the use of Lord Rochford, his heirs and assigns, to the intent and purpose that the said earl and his heirs should thenceforth hold the same enfranchised and discharged of and from all copyhold or customary tenure, and all quit-rents, suits, services, &c.

There was a presentment of this surrender on the 6th December, 1826.

The trustees, in execution, as they conceived, of the powers of the act of Parliament, having contracted to sell

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the Mountain Farm to the defendant, and having represented it to be freehold estate, the defendant objected to the purchase, on the ground, first, that the copyhold tenure did not by means of such surrender become extinguished, inasmuch as Lord Rochford was not at the date thereof seised of the manor, the legal estate therein being at that time outstanding, by virtue of a mortgage in fee made thereof to Thomas Coutts, Esq., by indentures of lease and release dated the 12th and 13th April, 1785, for securing certain sums of money which were still remaining due and unpaid at the date of the surrender; consequently that the premises, although agreed to be sold to the defendant as freehold, were still copyhold: secondly, that whether the premises were freehold or copyhold, yet, inasmuch as they were part or parcel of the manor of Wickham with its members, they were expressly excepted out of the power or trust for sale vested in the plaintiffs under the act of Parliament.

The cause now came on for hearing, upon exceptions to the Master's report finding that a good title could not be made to the farm.

Mr. *Wigram* and Mr. *Pole*, in support of the exceptions. —By the surrender of Mr. Davy to Lord Rochford, the right of holding the lands as copyholds became extinguished, although, no doubt, the extinguishment enured to the benefit of the mortgagee: *Doe d. Gibbons v. Pott (a)*, *Roe d. Hale v. Wegg (b)*. [The *Vice-Chancellor*.—The question whether Lord Rochford was legal lord of the manor seems a question of conveyance.] Upon the second point, admitting that the lands so enfranchised became parcel of the demesnes of the manor, which may be doubted, yet they were not precluded from being sold under the provisions of the act. The word “manor” in the third section does

(a) 2 Dougl. 710.

(b) 6 T. R. 708.

not refer to the *demesnes*, but means the *seignory* only. It is used in its popular and ordinary sense. If not, the effect will be, that these lands cannot be sold. But, according to the same argument, they could not even be leased for twenty-one years, except with the mansion; and must be kept "in good repair, order, and condition" with the mansion. It is clear, however, both from that part of the act, and also from the clause for building leases, where the word "manor" is not used, that these lands were not intended to be comprehended in that expression.

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The counsel on the other side were not heard.

The VICE-CHANCELLOR.—If I were under the necessity of coming to a conclusion upon the question, (which I am not), it is probable, that I should hold that the Mountain Farm was excluded from the power of sale given by the act. The word "manor," it is plain, includes what may be called the freehold interest in the copyholds of the manor. The acquisition by the lord of the copyhold interest in the Mountain Farm, and the consequent extinguishment of that copyhold interest, did not make the freehold less part of the manor. It has been from all time, it has never ceased to be, and is, part of the manor; and there is a prohibition from selling the manor or any part thereof.

It is said, that, from the other parts of the act, an inference may be collected, that, though such may be the general meaning of the word "manor," yet it was not the intention of the framers to use it in that extensive sense, but that they intended the Mountain Farm to be sold: and I agree there are parts of the act which give colour to that argument; but it does not go beyond that. I think that there is not enough to restrict the meaning of the word "manor" in the third section.

The question, however, is, whether there is ground for

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grave and reasonable doubt against the vendor's title in this case ; and I am of opinion, stating the case most favourably to the vendor, that there is ground for grave and reasonable doubt. Therefore, upon the authority of *Shapland v. Smith* (a), *Jervoise v. Duke of Northumberland* (b), and many other cases, it appears to me, that I cannot compel the purchaser to take this title. In *Jervoise v. Duke of Northumberland*, Lord *Eldon*, I think, cautiously avoided committing himself to any decision upon the mere point of good or bad title : but, in page 569 of the report, it appears, that he said this:—"The old course used to be, when a party was dissatisfied with the judgment of the Court, to compel him either to do as the Court required, or to appeal to the House of Lords ; not that that opinion was decisive, but it gave a sanction to the title, which would probably operate to the security of the purchaser. And I believe, that the first case in which that rule was departed from, was that of *Shapland v. Smith* ; and that the last case which went to the House of Lords was one in which Mr. Morris, a King's counsel, was plaintiff. The Court since that time has almost gone the length of saying, that, unless it was so confident, that if it had £95,000 to lay out on such an occasion, it would not hesitate to trust its own money on the title, it will not compel a purchaser to take it." Then, at the end of the case, he says, "The question, therefore, is, whether I can take upon myself to say, that this is not an executory trust ; if I can do that, but it must be upon the clearest ground, when I am to compel a purchaser to take the title, I agree it is an estate tail ; but, secondly, if something is to be done, if the trust is to be executed in this Court, the question is, in what manner it is to be executed ; and then, the last question is, whether it is so clear, the whole taken together, that this gentleman was himself to be tenant in

(a) 1 Bro. C. C. 75.

(b) 1 J. & W. 559.

tail, that I can compel the Duke of Northumberland to take the title." Lord *Eldon*, therefore, does little in the case but put a series of questions. If he decides anything, it is only, that the title was matter of grave and serious doubt.

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Exceptions overruled.

CAPPER v. TERRINGTON.

Feb. 17th.

A TESTATOR, being entitled to three mortgages on the estates of distinct mortgagors, devised them, by his will, to trustees upon certain trusts. The trustees afterwards conveyed the mortgages to new trustees by a single deed which had been settled in the Master's office, in a suit relating to the trust. One of the mortgagors then gave notice of his intention to pay off his mortgage, but the trustees refused to give up the mortgage-deed except upon the terms of the mortgagor entering into a covenant with them to produce it.

Three mortgages on the estates of distinct mortgagors were vested in the same trustees by one deed, which was prepared in the Master's office, in a suit for executing the trust. Upon the application of one of the mortgagors for liberty to redeem and to have his mortgage-deed delivered up to him:—*Held*, that he was entitled to have the deed, on his executing to the trustees a covenant to produce it, and paying the costs of the application; and that the costs properly incurred in preparing and settling the covenant should be borne by the mortgagee's estate.

The mortgagor now presented his petition, praying for liberty to pay his mortgage-money into Court, and that thereupon his mortgaged estate might be reconveyed, and the mortgage-deed delivered to him.

Mr. *Parry*, for the petitioner, said, that to ask a mortgagor redeeming to give a covenant to the mortgagee to produce his deeds was altogether a novelty. He stated, however, that the petitioner was not unwilling to do so, provided the respondents would pay the costs of the present application.

Mr. *E. F. Smith*, for the trustees, and

Mr. *Phillips*, for the parties beneficially interested in

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the mortgage fund, declined the terms offered, and insisted on the mortgagor's executing a covenant to produce the deed in question: *Wetherell v. Collins* (a).

The VICE-CHANCELLOR.—Either the mortgagor must have the deed, and execute a covenant to produce it, or the deed must remain with the trustees, they executing to the mortgagor a covenant to produce it. I do not say what I should do if all the mortgagors were present; but having one only before me, I think that he is entitled, if he so elects, to have the deed and execute the covenant. In that case, the deed of covenant must be settled by the Master, if the parties differ.

The costs of this application must be paid by the mortgagor; but, as the necessity for the covenant has arisen from the mortgagee or those representing him, mixing the lands comprised in the several securities, the costs of preparing and settling the covenant, so far as they shall be properly incurred, ought, I think, to be paid out of the mortgagee's estate. The latter costs, however, had better be reserved for the present.

(a) 3 Madd. 255.

See the next case.

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BURDEN v. OLDAKER.

*March 8th.
14th.*

JANE BENNETT, widow, being seised in fee of certain real estates, and possessed of various mortgages and other personal estates, gave and devised all her real estate to Edmund Wells Oldaker and John Wilson, and their heirs, upon trust as thereafter mentioned; and she directed her trustees to collect, get in, and sell her personal estate, and invest the same in the purchase of lands; and she gave the rents of all the said real estates, and the interest of the personalty until the same should be invested in real estate, to the said John Wilson for his life; and after his decease, she devised the real estates to certain uses in favour of Edward Lucas Burden, an infant, and others; and she made Oldaker and Wilson executors of her will.

Where deeds relating to mortgaged property (the mortgage being absolute at law) come into the custody of a court of equity, by means and in the course of a reasonable and proper administration of the mortgagee's estate, the costs of removing them out of Court, upon the mortgage being paid off, must be borne by the mortgagor.

The testatrix was at the time of her death possessed of, amongst other mortgages, a mortgage on certain freehold property at Pershore, in Worcestershire, of which John Workman was the owner of the equity of redemption in fee. That mortgage had become absolute in May, 1813.

After the testatrix's death a bill was filed by Edward Lucas Burden against the executors and others, praying that the will might be established as to the real and personal estate of the testatrix, and that the usual accounts might be taken of the personal estate of the testatrix and of her debts, and that the personalty might be applied in payment of her debts in a due course of administration, and that the residue might be ascertained and properly invested.

By the decree made on the hearing of the cause, it was, amongst other things, ordered that all deeds and documents in the hands of the defendants Edmund Wells Oldaker and John Wilson, or either of them, relating to the freehold, copyhold, and leasehold estates of the testa-

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trix, and to the mortgages and other securities whereon her personal estate, or any part thereof, was invested, should be deposited with the Master, without prejudice to any application to be made thereafter by any party for the delivery up or otherwise of the said deeds or documents, or any of them.

In pursuance of this decree the deeds relating to the mortgage securities of the testatrix were deposited in the Master's office.

A petition was now presented by Workman for liberty to pay the amount due in respect of his mortgage into Court, and that the mortgage-deed, and title-deeds relating to the mortgaged premises, might be delivered to him. The only question was as to the costs of this application.

Mr. Swanston, for the petitioner.

Mr. Russell, for other parties.

March 14th. **THE VICE-CHANCELLOR.**—This petition, I am informed, has been or is to be amended, and is to be considered as amended, by making it the petition of Mr. Workman (*a*), who, though not the original mortgagor, is the person entitled to the equity of redemption, and desirous of paying off the mortgage; so amended, however, I understand, as to submit, not to pay but to abide by any order that the Court may make as to the costs and charges mentioned in the prayer. The parties, I collect, indeed, without reference to the particular terms of the petition, wish the opinion of the Court upon the general question, whether, the mortgage-deed and the title-deeds of the mortgaged estate being in Court in a suit, which this suit is, for performing the trusts

(*a*) The petition had originally been presented in the name of John Wilson.

of the will and for administering the assets of the mortgagee, (purposes foreign to the mortgagor), he ought to pay the costs of obtaining an order for delivering them out of Court to him upon paying off the debt; the instruments having, as I understand, been deposited with the Master by the executors and trustees of the mortgagee's will, under the decree, as a matter of ordinary course, and not in consequence of any default or misconduct of any kind. The mortgage I suppose, became legally forfeited in the mortgagee's lifetime, and the decree appears to have extended to the deposit of all deeds and documents in the hands of the mortgagee's trustees and executors relating to her freehold, copyhold, and leasehold estates, as well as to the mortgages and other securities whereon her personal estate was invested. The nature of her will seems to have rendered this a reasonable measure so far as her estate was concerned. In this state of circumstances, I think that the proper costs of obtaining an order for delivering the mortgagor's deeds out of Court to him fall within the principle on which *Wetherell v. Collins* (a), and other cases of that description, have been decided, and must therefore be borne by the mortgagor; the deeds having come into the custody of the Court (from which without an order they cannot be removed) by means, and in the course, of a reasonable and proper administration of the mortgagee's estate; of which this mortgage, forfeited in her lifetime at law, though continuing redeemable in equity, formed at her death a part.

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OLDAKER.

(a) 3 Madd. 255.

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Testator, by his will, directed his executors to place out upon government security such a sum of money out of the interest thereof, as would be sufficient to produce an annuity of £50, which he gave unto his daughter I., for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst such issue; but if she should die without issue, he gave the same unto and equally amongst his surviving children and their legal representatives, share and share alike. The testator had four children living at the date of his will and of his death, of whom the daughter I. was the survivor. She died without leaving issue:—*Held*, that the words

“surviving

children” meant children surviving the daughter I.; and that the words “legal personal representatives” must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently, that the fund, of which the testator’s daughter was the tenant for life, fell into the testator’s residuary estate.

TAYLOR v. BEVERLEY.

THE will of Christopher Beverley, dated in 1822, contained the following bequest:—“And, as a provision for my daughter Isabella, the wife of John Howson, who has at present no children, I do hereby order and direct my executrix and executors hereinafter named to place out at interest, upon government or other good security, such sum of money, part of the said £6000, as by and out of the interest thereof will be sufficient to produce one annuity or clear yearly sum of £50 of lawful English money, which I do hereby give and devise unto my said daughter Isabella Howson, for and during her natural life, to and for her own sole and separate use and disposal, and to be paid to her by four quarterly payments in each year; the first payment to commence and be made at the end of three months next after my decease; and from and after the decease of my said daughter Isabella Howson, in case she shall leave issue, I do give and devise the principal sum or sums of money whereon the said last-mentioned annuity or clear yearly sum of £50 shall be secured as aforesaid unto and equally amongst such issue; but if she shall die without issue, I give and devise the same unto and equally amongst my surviving children and their legal personal representatives, share and share alike.” The testator bequeathed the residue of his estate to his son John.

The testator, who had married in 1778, had five children. One of them, a daughter, died an infant and unmarried in 1802. The other children, viz., John, Christopher, Frances Holgate, and Isabella Howson, were alive both when he

made his will and at the time of his death; of these, Isabella Howson was the survivor. She died without leaving issue. | The bill was filed by the executors and trustees under the testator's will, praying for the directions of the Court as to the fund of which the testator's daughter, Isabella Howson, had been the tenant for life. The question, to whom such fund now belonged, depended upon the meaning of the words "my surviving children, &c."

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Mr. *Stinton*, for the plaintiffs.

Mr. *Wigram* and Mr. *Headlam*, for the representatives of John.—We agree, that the words "without issue" should be read "without such issue." Then the question is, to what period the words of survivorship refer? In modern times, the inclination of the Courts has been to construe the word "surviving" as referring to the period of distribution. Here the period of distribution is clearly the death of Isabella Howson. In case she leaves issue at her death, the testator gives the fund to such issue; but in case she shall not leave issue at her death, he gives it to his surviving children; that is to say, to his children *then* surviving. The alternative between the issue and the surviving children marks the period of distribution: *Cripps v. Wolcott* (a), *Pope v. Whitcombe* (b), *Gibbs v. Tait* (c), *Wordsworth v. Wood* (d). If the word "surviving" be referred to the death of the tenant for life, Isabella Howson would herself have taken a share; but the whole aspect of the will is against that construction: *Butler v. Bushnell* (e).

The gift to the surviving children is absolute. The words "legal representatives" must have their ordinary import, that is to say, "executors, administrators, and assigns:" *Price v. Strange* (f), *Saberton v. Skeels* (g). To give them

(a) 4 Madd. 11.

(b) 3 Russ. 124.

(c) 8 Sim. 132.

(d) 2 Beav. 25.

(e) 3 Myl. & K. 232.

(f) 6 Madd. 159.

(g) 1 Russ. & M. 589; see ante, p. 9.

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any other meaning, the Court must convert the word “and,” which immediately precedes them, into “or.”

Mr. *Kenyon Parker*, Mr. *Malins*, and Mr. *Shee*, for the next of kin and personal representatives of Frances Holgate. —The words of survivorship are to be referred to the death of the testator, and not to the death of the tenant for life. The testator uses the word “surviving” either in the sense of “other” or as surviving himself; for he had had a child who died before the date of his will; he might, therefore, properly refer to those who should survive himself: *Barlow v. Salter* (a). In *Doe d. Watts v. Wainewright* (b), which is a leading case on this subject, an estate was limited by deed to the use of A. and B., with remainder to the use of the children of B., as tenants in common in tail, with a proviso that, if any such children should die without issue of their bodies, the share of such child should go to the *surviving* child or children of B. in tail, and in case all the said children should die without issue, then to A. in fee; and it was held, that, on the death of one of the children of B. without issue, his share vested in a surviving child, and the heir of one deceased as tenants in common. [The *Vice-Chancellor* adverted to the observation of Lord *Kenyon* upon the words “and in case *all* the said children, &c.”] The result of that case was, that the word “surviving” was construed “other.” That mode of construction was recognised in *Doe d. Tanner v. Dorvell* (c), though in that case the Court declined to act upon it, on the ground that cross-remainders could not be implied in a deed. In *Cole v. Sewell* (d), a case of the same description, the word “survivors” was construed “others.” *Aiton v. Brooks* (e). In *Davidson v. Dallas* (f), Lord *Eldon* says, “The difficulty that has always been felt to apply the term ‘survivors’ to those who may not be alive at the time of the distribution taking

(a) 17 Ves. 479.

(b) 5 T. R. 427.

(c) 5 T. R. 518.

(d) 2 Conn. & Law. 344.

(e) 7 Sim. 204.

(f) 14 Ves. 578.

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place, has been met by presuming that the testator intended persons not then living, but who might come into existence before the distribution; construing the word 'survivors' as 'others,' to take in all who should come into existence before that period." The same doctrine equally applies in relation to persons who happen to die previously to the time when the fund is payable: *Stringer v. Phillips* (a), *Wilson v. Bayly* (b), *Roebuck v. Dean* (c), *Perry v. Woods* (d), *Maberly v. Strode* (e), *Brown v. Bigg* (f), *Wilmot v. Wilmot* (g), *Salisbury v. Petty* (h). The same principle applies to realty: *Rose d. Vere v. Hill* (i), *Garland v. Thomas* (k), *Edwards v. Symons* (l), *Doe d. Lifford v. Sparrow* (m), *Doe d. Long v. Prigg* (n). Courts of law and equity lean to the doctrine of vesting at the earliest period, and that is, in truth, the principle upon which these cases rest. The case of *Cripps v. Wolcott*, however, introduced a perfectly new principle, and was a new decision. [The *Vice-Chancellor*.—I never heard the correctness of the decision in that case disputed. There appears to have been no gift there except in the direction to divide.] Upon that ground, the case may be reconciled with *Hoghton v. Whitgreave* (o), *Brograve v. Winder* (p), *Newton v. Ayscough* (q), *Daniell v. Daniell* (r), and *Pope v. Whitcombe*, in which case the gift was not to be converted or to exist in the form in which it was given until after the expiration of the life estate, which is not the case here.

It may be remarked, that in most of the cases, some one of the persons to whom the fund is given actually survived the period of distribution; but, supposing the tes-

(a) 1 Eq. Ca. Abr. 292, pl. 11.

(b) 3 Bro. P. C. (ed. Toml.) 195.

(c) 2 Ves. jun. 265.

(d) 3 Ves. 204.

(e) 3 Ves. 450.

(f) 7 Ves. 279.

(g) 8 Ves. 10.

(h) 3 Hare, 86.

(i) 3 Burr. 1881.

(k) 1 N. R. 82.

(l) 2 Marsh. 24; 6 Taunt. 213.

(m) 13 East, 359.

(n) 8 B. & C. 231.

(o) 1 J. & W. 146.

(p) 2 Ves. jun. 634.

(q) 19 Ves. 534.

(r) 6 Ves. 297.

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tator, by the word “surviving,” to refer to children who should survive *himself*, it follows that, even if all die before the period of distribution, which is the case here, the Court will distribute the fund between their personal representatives: *Harrison v. Foreman* (a), *Sturgess v. Pearson* (b).

With respect to the words “legal personal representations,” whether they be considered as words of limitation or purchase, they refer only to the case of children surviving the testator and dying in the lifetime of the tenant for life. They are properly, however, words of purchase; the representatives, or next of kin, taking by substitution. *Cotton v. Cotton* (c), *Booth v. Vicars* (d). That they are not words of limitation seems clear from the circumstance, that the words “amongst” and “share and share alike” apply as well to them as to the word “children.” If they are considered as applying only to the children surviving the tenant for life, they become mere surplusage; and yet it is clear that the testator intended them to have some meaning beyond that of “executors, administrators, and assigns,” because he has not used them in connexion with any other bequest in the will.

Mr. *Birkbeck* and Mr. *Rolt*, for the representatives of Christopher, took a similar line of argument; citing *Eyre v. Marsden* (e) and *Massey v. Hudson* (f), and commenting principally on the effect of the words “legal personal representatives.”

Mr. *Wigram*, in the course of his reply, referred to *Brograve v. Winder*, *Daniell v. Daniell*, *Shergold v. Boone* (g), and *Crowder v. Stone* (h).

(a) 5 Ves. 207.

(b) 4 Madd. 411; see 6 Madd. 250.

(c) 2 Beav. 67.

(d) Ante, p. 6.

(e) 4 Myl. & C. 231.

(f) 2 Mer. 130.

(g) 13 Ves. 370.

(h) 3 Russ. 217.

The following cases were also mentioned in the course of the argument:—*Winterton v. Crawford* (a), *Ferguson v. Dunbar* (b), *Leeming v. Sherratt* (c), *Ranelagh v. Ranelagh* (d), *Cromek v. Lumb* (e), *Hoste v. Pratt* (f), *Russell v. Long* (g), and *Hetherington v. Oakman* (h).

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The VICE-CHANCELLOR. — The bequest of which the Court has to decide the construction in this cause is contained in the will of Christopher Beverley in these words. [His Honour here read the bequest as above stated.] Four children of the testator having been alive when the will was made, and at his death, of whom Isabella Howson, who has died without leaving issue, was the survivor, the first question argued has been, whether the words “surviving children” ought not to be construed as meaning “other children.”

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It is probably true that where an estate or fund is given between a class or number of persons as tenants in common in tail, or for life, with remainders, or interests in the nature of remainders, to their children respectively, and a valid provision is made, that in the event of the death and failure of issue of any of the original takers, the share of the original taker or takers so circumstanced shall go to the survivors or survivor of them, the words “survivors or survivor” may, in general, well be considered as an expression of contrast, used for the purpose of distinguishing the takers not so circumstanced, and therefore as meaning “others or other;” and so in analogous instances. But is the case the same where, the words being such as here, “surviving children,” no interest in any portion of the subject of which the whole or part is so given to “surviving children” has been previously given to those children

(a) 1 Russ. & M. 407.

(b) 3 Bro. C. C. 469, n.

(c) 2 Hare, 14.

(d) 2 Myl. & K. 441.

(e) 3 Y. & C. 565.

(f) 3 Ves. 730.

(g) 4 Ves. 551.

(h) 2 Y. & C. C. C. 299.

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or either of them, if the words are read as "other children?" My impression is, that the word "survivors," the word "survivor," and the word "surviving," ought, in a will, to receive their natural and ordinary construction, that is, to be read as not meaning "other," unless the nature of the disposition itself, in which the expression occurs, or the context of the instrument containing the disposition, renders a departure from that natural and ordinary interpretation necessary to effectuate what the whole of the disposition, from its nature, or the whole of the instrument taken together, shews to have been the testator's intention; and this seems to have been the view taken by the present *Lord Chancellor* in *Crowder v. Stone*. In the will before me neither the nature of the particular disposition, nor the context, appears to me to require or justify such a departure; and, I think, accordingly, that the word "surviving" must be read as meaning "surviving," and not as meaning "other;" a construction which, applied to this will, appears to me entirely consistent with the decisions in *Doe v. Wainwright* and *Wilmot v. Wilmot*.

To what period, then, does the word "surviving," as used by this testator, refer? This, as Sir *William Grant* said in *Newton v. Ayscough* (a), depends on the testator's intention, to be collected either from the particular disposition or the general context of the will. It has not been argued, and it could not, I think, have well been argued, that anything turns upon the fact that the testator had a child who died before the making of the will. The child is stated to have been a daughter who never married, and whose death happened more than twenty years before the will was made. Nor has it been contended at the bar, on either side, that had the word "surviving" been omitted, and one of the sons, living when the will was made, died before the testator's death, that son's share under this

(a) 19 Ves. 536.

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bequest would have fallen into the general residue by lapse. Whether it would or would not, I wish to be understood as not intimating any opinion. But if it would not, then the word “surviving,” if to be understood as referring to the time of the testator’s death, is surplusage. However this may be, it would not, I think, be a proper construction of the will before me so to read the word “surviving.” Considering that Isabella Howson was one of the testator’s children living when the will was made and at his death,—considering the event that was to give a title to the persons called the testator’s surviving children, and the place in which the expression occurs, I conceive that the phrase “my surviving children,” as used in this will, means “my children then living,” or (that which is the same) “my children surviving Isabella Howson.” If the testator had said, “Upon the death of either of my children a sum of £1000 shall go to my surviving children,” could a doubt be entertained as to the time to which the word surviving was meant to refer? Has he in the passage under consideration, where he has not said “other children” or “other surviving children” less plainly used a term of distinction between Isabella Howson, and others, his children—that distinction being, her death and their continuance in life?

The words “die without issue” have been agreed on all hands to mean “die without leaving issue,” as they are here found. It has been contended that the word “and” immediately following the words “surviving children” may be read “or,” and, this being done, that the word “surviving” would necessarily have to be construed as referring to the time of the testator’s death. Whether such a consequence would follow I have not found it essential to consider, there not being, in my judgment, anything contained in the will which could be held to justify such a reading of the word “and.” Certainly it may sometimes mean “or,” but here there is no ground for changing its ordinary sense.

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The remaining question is, as to the construction of the words "their legal personal representatives." It was suggested, I think by Mr. *Rolt*, that the word "their" might be read as referring to the testator's children generally, not merely to those whom he has called his "surviving children." But I cannot see any ground or place for such an argument. It was also contended, that the words "legal personal representatives" import in this will kindred or representation in blood, and are, therefore, words of purchase, not meaning merely representation in estate; a question, to the cases cited upon which, *Corbyn v. French* (a) may, perhaps, be added. How the matter might have stood had the word "personal" been omitted, I need not say; but the word "personal" is part of the passage as well as the word "legal." That it is impossible to suppose a will so worded, as that the expression "legal personal representatives" should mean "kindred" or representatives in blood, I will not say; but certainly, it would require a context strongly and clearly denoting such an intention in order to justify a departure so wide from the proper meaning of the phrase. Such a departure could not be justified by the mere circumstance that the words in their ordinary and proper sense are surplusage, as possibly they may be; and explanatory context there is none. It follows, that, in my opinion, as Isabella Howson was the testator's last surviving child, the fund, of which she was tenant for life, has fallen into the residue. *Harrison v. Foreman*, *Smither v. Willock* (b), *Brown v. Lord Kenyon* (c), and *Sturges v. Pearson*, authorities that I do not question, have no application to a bequest of the present description, to surviving children only.

Much stress was laid in the argument upon the cases of *Wilson v. Bayly* and *Doe v. Prigg*. The will construed in *Wilson v. Bayly* differs from the will before me sufficiently

(a) 4 Ves. 418.

(b) 9 Ves. 233.

(c) 3 Madd. 410.

to prevent that case, in my opinion, from governing the present in form or substance. The words of the material disposition in the will of Mark Tew having been "my daughters, Mary, Sarah, and Catherine, and the survivors and survivor of them and their assigns," the expression "as tenants in common" having been added, and in the parts of his will providing for the event of the death of his daughters, or any or either of them, before marriage, and bequeathing the residue of his estate, the testator having used the words "survivors" and "survivor" as he appears to have done, I cannot think that I am contradicting or contravening what the House of Lords did in that case by deciding as I deem it right to do in this. I have considered, also, the case of *Doe v. Prigg* with the attention and respect due to such an authority. But supposing it not to be substantially distinguishable from the present, a point on which I give no opinion, I am not prepared to follow it in this cause; conceiving, as I do, that it does not so absolutely bind the Court as to place me under the necessity of ascribing to the word "surviving," in the will before me, a sense contrary to my deliberate conviction. It may be observed, that it is not, as I read the report of *Doe v. Prigg*, to be collected from it whether William Jennings or John Warren was living when the will was made, or whether any child of either of them died in the testator's lifetime. But his wife was not, and it does not appear that his mother was, a child of William Jennings or of John Warren.

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Testator bequeathed one-fifth of his residuary personal estate to trustees upon trust for all and every the children or child of his son J. B., born and to be born, and who, being a son or sons, should live to attain twenty-one, or being a daughter or daughters, should live to attain that age or be married, to be equally divided between them, if more than one, share and share alike, as tenants in common; and he directed that the dividends, interest, and income, of the share or expectant share of each such child should be paid to his said

THOMAS BATEMAN, M. D., by his will, dated in 1829, after devising his real estate to his son George Bateman and Sir William Foster and their heirs upon trust for sale, and after directing that the produce of such sale should fall into and be considered as part of the residue of his personal estate, directed that his said trustees, whom he also appointed his executors, should stand possessed of the residue of his personal estate after payment of his debts and legacies, upon trust to divide the same into five equal shares, and to transfer one of such shares to his said son George Bateman, his executors, administrators, and assigns; and as to the other four-fifths, to invest the same upon any of the stocks or funds of Great Britain, or upon real securities, and to stand possessed of such funds and securities and the dividends, interest and annual produce thereof upon the trusts thereafter mentioned, that is to say, [the testator then proceeded in these words:—] “As, to, for and concerning one other full and equal fifth part or share of and in the said net produce of my said real and personal estate so to be invested as aforesaid, and the stocks, funds, and securities, to answer the same, and the dividends, interest and income thereof, upon trust for all

son J. B., during his life, and after his decease, then during the minority of each such child should be retained by his said trustees or trustee, and be applied by him or them, as the event should happen, in, for, or towards the maintenance, clothing, and advancement, of each such child, in such proportion, manner, and form, as his said son J. B., or, as the event might happen, his said trustee or trustees, should think fit. At the date of the will and of the testator's death, J. B. had three children, one of whom, a son, afterwards attained twenty-one, married and lived separately from his father:—*Held*, first, that a trust was constituted in J. B. of the income, for the maintenance, clothing, and advancement, of his children, which trust did not terminate upon all or any of his three children attaining majority in his lifetime; secondly, that J. B. was not entitled to apply the income arbitrarily, according to his own will and pleasure; thirdly, that he was entitled to apply the income of a child's prospective share towards that child's maintenance, clothing, and advancement, without reference to his ability to maintain and educate that child; and fourthly, that the son who had attained his majority was not entitled to an immediate transfer of one-third of the fund, inasmuch as it did not appear that the testator intended to exclude after-born children, and at all events he did intend to authorize an unequal distribution from time to time of the income for the benefit of J. B.'s children.

and every the children or child of my said son James Bateman born and to be born, and who being a son or sons, shall live to attain the age of twenty-one years, or being a daughter or daughters, shall live to attain that age or be married, to be equally divided between them, if more than one, share and share alike, as tenants in common; and in case there shall be only one such child of my said son James Bateman, then the whole of the same part or share of the said trust monies, stocks, funds, and securities, shall be in trust for that one child absolutely: and the dividends, interest, and income of the share or expectant share of each such child of and in the said trust-monies, stocks, funds, and securities, shall be paid to my said son James Bateman during his life, and after his decease, then, during the minority of each such child, be retained by my said trustees or trustee, and be applied by him or them, as the event shall happen, in, for, or towards the maintenance, clothing, and advancement, of each such child, in such proportion, manner, and form, as he my said son James Bateman, or as the event may happen, my said trustee or trustees, shall think fit. And I declare that the receipts of the said James Bateman shall from time to time be good and sufficient discharges for so much of the said dividends, interest, and income, as shall therein or thereby respectively be expressed to have been received."

The testator then bequeathed the remaining three-fifths of his residuary personal estate upon trust for his three daughters, named, in equal shares as tenants in common for their respective lives, for their separate use; and after their respective deaths, the share of each to be in trust for their respective children, to be equally divided between them, share and share alike, and to be vested interests in the sons at twenty-one, and in the daughters at twenty-one or marriage, with a direction that the income of the share of each of such grandchildren should be applied for or towards his or her maintenance, education, clothing, and

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advancement, during his or her minority in such manner and proportions as his said trustee or trustees should think fit. In default of children of the daughters, or in case of the death of such children (if any) before attaining vested interests, the testator bequeathed the last-mentioned three-fifths to George Bateman and the children of James in equal moieties, the latter taking subject to the same trusts as before.

The testator died in 1834, leaving the five children named in his will, and no others, surviving him. At the date of his will and of his death there were three children of James Bateman living, namely, a son and two daughters, and no other children of James Bateman had been born at the hearing of the cause.

The executors proved the will of the testator, paid his debts and legacies, and invested four equal fifth parts of the residue for the purpose of answering the trusts of the will. They also, until the eldest child of James Bateman came of age, paid the annual dividends or income of one of these fifth parts to James Bateman, for the purpose of being applied by him in the maintenance, clothing, and advancement of his children.

Thomas, the eldest child of James Bateman, having come of age, the present bill was filed by him, on behalf of himself and his two infant sisters, against the executors, and against James Bateman and others, praying, amongst other things, that it might be declared that the plaintiff Thomas was entitled to an immediate transfer and payment to him of a one-third part of one-fifth of the residue, and to all interest thereon since he attained his majority, and that the remaining two-thirds of one-fifth might be secured for the benefit of his sisters.

Mr. *Swanston* and Mr. *Haddan*, for the plaintiffs.—The testator gives the capital of one-fifth of the residue to the children of James Bateman, and by a subsequent clause

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makes provision for the maintenance, clothing, and advancement of each child during minority. For this purpose, there must be a trustee; and while the father lives, he is the person whose discretion is to regulate the distribution of the fund during minority. [The *Vice-Chancellor*.—It is not said, that the income is to be paid to the father during the minority of his children, but during his life.] It is submitted that, according to the context, he is to receive it during their minority only. If the words “during the minority of each such child” had been placed either at the beginning or the end of the sentence in which they occur, there could have been no doubt. The doubt arises from their being placed in the middle; but that doubt is removed by the subsequent words “him or them” and “as the event shall happen,” which evidently refer to the trusteeship *either* of the father *or* the trustees of the will. The receipt clause shews that it was not intended to give the father a beneficial interest; for, if he was tenant for life, it would not be required. [The *Vice-Chancellor*.—The question is not so much, whether he was a trustee, as during what time the trust was to continue. If a child can say, “I will not be clothed or advanced, give me the money,” there is no discretionary trust.] The trust is determinable upon the eldest son attaining his majority, and he is then entitled to an immediate transfer of his share: *Whitbread v. Lord St. John* (a), *Gilbert v. Boorman* (b), *Prescott v. Long* (c), *Hoste v. Pratt* (d), *Kilvington v. Gray* (e), *Pearse v. Catton* (f), *Titcomb v. Butler* (g). The fact of the father being a trustee makes no difference in this construction: *Andrews v. Partington* (h). [The *Vice-Chancellor* referred to the stat. 43 *Eliz.* c. 2, sect. 7 (i).]

(a) 10 *Ves.* 152.

(b) 11 *Ves.* 238.

(c) 2 *Ves. jun.* 690.

(d) 3 *Ves.* 730.

(e) 10 *Sim.* 293.

(f) 1 *Beav.* 352.

(g) 3 *Sim.* 417.

(h) 3 *Bro. C. C.* 401; see *Pufendorf*, book 6, ch. 2, sect. 8.

(i) Which enactment is expressly kept alive by the stat. 4 & 5 *Will.* 4, c. 76, sect. 56.

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Mr. *Wigram* and Mr. *Rolt*, for the defendant James Bateman.—There is no difficulty in giving the father a discretionary power to distribute the income of the fund during his life. The Court would be warranted in so doing both by the terms of the will and the circumstances of the case. Here are three children, one of whom, a son, is married, and lives separately from his father: why then, unless the terms of the will are imperative on the subject, should he be permitted now to withdraw his share of the fund (supposing him to have a fixed share) to the detriment of the rest of the family? The expressions of your Honor in *Longmore v. Elcum* (a) are peculiarly applicable to this case. Then, upon the terms of the will, full effect must be given to the words “proportion, manner, and form.” Giving them full effect, the bankruptcy or insolvency of a child might be provided for; but if, when the eldest child attains twenty-one, each child then born is to take equally, what becomes of these words? It is clear upon the will, that children, born after one attains twenty-one, take an interest. If the testator had meant otherwise, he would only have used the word “expectant” in reference to the shares. He, however, uses the words “share or expectant share;” and no force can be given to the word “share” standing singly, unless it be held to mean the share of a child attaining twenty-one in the father’s lifetime. *Scott v. Earl of Scarborough* (b), *Brandon v. Aston* (c).

Mr. *Micklethwait*, for the defendants, the executors.

Mr. *Swanston*, in reply.—The words “share or expectant share” put it out of doubt that the testator distinguished between shares that were vested and shares that were not. The phrase establishes that the father, as trustee, was to deal with each share distributively. The share of a child

(a) 2 Y. & C. C. C. 370. (b) 1 Beav. 154. (c) 2 Y. & C. C. C. 30.

ceases to be expectant and becomes vested when he attains twenty-one; and it is right that it should be so. It is important that the rights of parties should be ascertained as soon as possible. It is material that children should not be left in uncertainty as to their property during their whole lives. It is upon this principle that *Ellison v. Airey* (a) and a whole class of authorities, which have never yet been doubted, have been decided. In this case, the son is foris-familiated, and has an absolute title; there can be no intervention, which this Court can recognize, between him and his rights. Even the liability of his father to maintain him, if it still existed, could not prejudice those rights. It is admitted that this is a trust in the father; but it is said to be a trust for the maintenance, clothing, and advancement of the son. If so, what becomes of the income when the son is gone to his account? It must be considered as derelict, for the father, as trustee, cannot take it.

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The VICE-CHANCELLOR.—The point upon which my judgment was reserved in this case is concerning the construction to be put on the dispositions made by Dr. Bateman's will, as to one of the five shares into which he directed his residuary property to be divided, in these words. [His Honor here read the bequest as before stated.]

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It was contended by the plaintiffs' counsel that the words "during the minority of each child" are properly referable, as well to the lifetime of Mr. James Bateman, (who is still living), as to time after his decease, and that the words "during his life" ought to receive in construction a corresponding restriction. To this argument, however, I am unable to accede. To do so would be, without any necessity or reason arising either from the context of the instrument or from extrinsic circumstances, to disregard the correct as well as ordinary meaning of words—

(a) 1 Vez. sen. 111.

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to depart from accurate as well as popular rules and habits of phraseology. The expression "during his life" means clearly, I apprehend, a period which has not yet determined, though one of the children of Mr. James Bateman has attained majority, and which would not have determined, though (he still being alive) all his children now living were not only living, but also of full age.

It may here be observed that I have not to deal with such a state of circumstances as would have existed, if any one or more of the children living when the will was made, (as all the children now living were), or who afterwards came into existence, (as none did), had died, for there has been no such death.

The next question is, whether Mr. James Bateman was entitled to expend and apply the income of this fifth share, which has accrued since the death, in the year 1834, of the testator, at his own uncontrollable will and pleasure, for any purposes, or in any manner that he might think fit, whatever might be his conduct towards his children. I am of opinion, that he was not so entitled, nor do I consider that his counsel have contended for any such right on his part. The same observation will, of course, apply to the future income of the share during the joint lives of himself and all or either of his three children.

But was he entitled, during the minority of his son, the only child now of age, to apply the income of the son's presumptive portion in or towards the son's maintenance, clothing, and advancement, or either of those purposes, without reference to his own ability, and whether of ability or not of ability, to maintain and educate the son from his own resources without assistance? I am of opinion, that, according to the true construction of the will, Mr. James Bateman was so entitled, and that a benefit, to that extent at least, was intended to be given to him. Such a purpose being, as in my opinion it is, expressed with sufficient plainness, I am bound to give effect to it. The same ob-

servation applies, of course, to each of the daughters severally, as to their presumptive portions to the present time.

It has in effect been admitted on all hands, that he properly maintained and educated and did his duty towards the son up to his majority, and has properly maintained and educated and done his duty towards the daughters to the present time. An inquiry in any such respect not being asked, I do not think it necessary to direct any.

The total amount of the capital of the fifth share being, as I collect, under £5000, the family being in the condition of life in which they appear to be, the three children having been born respectively in December, 1821, February, 1826, and August, 1827, the testator's death having happened in 1834, and my opinion as to the power of unequal distribution, being what I shall presently state it to be, I think that I may safely venture to accede to what I understand to be desired by the counsel for all the parties, namely, to the allowance to Mr. James Bateman of the whole income upon this share hitherto accrued; the payments since the son's majority having, as I am informed by the Bar, been made upon the joint receipts of the father and son. I may observe, however, in passing, that, from what has been stated at the Bar, I consider it to be highly probable, and in effect admitted, that Mr. James Bateman has not been and is not of ability, from his own resources, to maintain and educate his children, as that phrase has long been practically understood in this Court. This is plainly not doubted by any party.

The father continuing to perform his duty towards his daughters, as I understand him hitherto to have performed it, will, in my judgment, (as follows from what I have said), be entitled, as to the elder daughter's presumptive portion, until his own death, or her death, majority, or marriage, and as to the younger daughter's presumptive portion, until his or her death or her majority or marriage, to receive and expend the income of those portions respectively.

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Then comes the question raised on the part of the son, whether, being of age, he is entitled now to demand payment to himself of one-third of the capital of the share in question, or to be let at least into the personal receipt and personal expenditure of its income. I am of opinion that the former branch of this question must be answered in the negative. It may be true that the answer must have been different had the dispositions made concerning this fifth share stopped at the word "absolutely." But taking the whole will together, and considering especially the provisions made as to maintenance, clothing, and advancement, to which I have been particularly referring, my impression of the true construction of this instrument is, that a child of Mr. James Bateman hereafter coming into existence, whether before or after the majority of the youngest of the present children, was not intended to be, and is not, excluded necessarily from participation in the fifth share in question. Whether, however, that impression is correct or erroneous, I think, notwithstanding the testator's use, more than once, of the word "each," as he has used it, that the expression "in such proportions, manner, and form," coupled with the context, shews that the testator meant to authorize an unequal distribution, from time to time, for the benefit of Mr. James Bateman's children, of the income directed to be paid to him, and be applied by him in or towards maintenance, clothing, and advancement;—so that, for instance, in the present year, an application of the present year's income in the proportion of five-sixths for the daughters, and one-sixth for the son, might, if fair and reasonable under existing circumstances, be justifiable.

If I am right in this view of the will, the son cannot now be let into the personal receipt and personal expenditure of the income of one-third of the fifth share in question. But the whole of the income must be paid until the death of Mr. James Bateman, or either of his three children,

or until further order, to Mr. James Bateman ; he undertaking duly and properly to apply it in, for, or towards the maintenance and advancement or the maintenance of the three plaintiffs, in such proportions, manner and form as he shall reasonably and fairly think fit.

What I should have done, or shall do, if Mr. James Bateman had committed, or shall commit, any breach of trust or of duty towards either of his children it is unnecessary to say. Such a case has not arisen ; I hope that it will not arise, and I do not expect that it will. It has been stated and admitted at the Bar, that though the son, being married, does not live with the father, they are on perfectly good terms together, that they are mutually satisfied with each other's conduct past and present, that the son has been placed in an office or employment producing him some income which he now holds, and that he also receives, and ever since his majority has received, a certain allowance from the father.

Nor do I say what, if any, will be the effect of death, bankruptcy, insolvency, or an assignment, on the part of either of the plaintiffs, or the marriage of either of the daughters. On these points, I entirely reserve myself.

THE parties by their counsel, now requesting the decision of the Court as to their rights and interests under the will of the testator, and waiving any account of the testator's estate, and the several parties by their counsel admitting that the past income of the shares of the testator's residuary personal estate bequeathed for the benefit of the children of the defendant James Bateman, has been duly applied for their benefit, let the future income of the said shares of the said residuary personal estate be paid to the defendant James Bateman, during his life, or until the death of any one of the plaintiffs (naming them), or until further order ; the defendant James Bateman, by his counsel, undertaking duly and properly to apply the whole of such income in or towards the maintenance and advancement in life, or the maintenance of the plaintiffs, in such proportion, manner, and form as he shall reasonably and fairly think fit. Refer it to the taxing Master to tax all parties their costs of this suit as between solicitor and client ; and let such costs when taxed be paid by the defendants, the executors of the testator, out of his residuary personal estate. Liberty to any of the parties to apply.

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Testatrix bequeathed £3000 to trustees upon trust to pay the interest to B. for life; and after the decease of B. the testatrix willed that the said £3000 should be equally divided among such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one; but her will was that if B. should die without leaving issue, then the £3000 should be paid to C. : —*Held*, that the children of B. took vested interests in the £3000 at her death, and consequently that the share of one who died after B., under the age of twenty-one, devolved to her father as her administrator.

BREE v. PERFECT.

ANNE ROBINSON, by her will, dated the 28th January, 1835, gave to her executors William Perfect and J. C. Perfect the sum of £3000, upon trust to place the same out at interest and pay such interest as they might make to her niece Frances Bree, the wife of the Rev. R. S. Bree, for her sole and separate use during her life; “and at the death of my said niece Frances Bree, I will that the said principal sum of £3000 shall be equally divided among such of her children as shall be living at the time of her death, as they respectively attain the age of twenty-one; but my will is, that, if my said niece Frances Bree shall die without leaving issue lawfully begotten, then the interest of the said sum of £3000 shall be paid to my sister Catherine Maria Perfect during her life, and at her death the said £3000 shall be equally divided among the children of the said C. M. Perfect.”

The testatrix died in 1837. Frances Bree died in April, 1838, leaving four children only, the eldest of whom was born in July, 1829.

By an order of the Court of Exchequer, dated the 20th February, 1839, and made in this cause, in which the infant children of Mrs. Bree were sole plaintiffs, and the executors of the testatrix sole defendants, it was ordered, that the executors should transfer into Court, to the account of the infant legatees, a sum of Stock which had been set apart to answer the legacy of £3000; and it was referred to the Master to inquire and state to the Court what children of Mrs. Bree were living at her death, when they were respectively born, whether any, and which, had died since Mrs. Bree's death, and if any had so died, who was or were the legal personal representatives of the children so dying.

After the date of this order, Jesse Matilda Bree, one of

the children, died, under twenty-one; whereupon her father took out letters of administration of her estate, and, as such administrator, now presented his petition, praying that one fourth part of the stock in Court, being his deceased daughter's share therein, might be transferred to him.

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Mr. *James Parker*, for the petitioner, observed, that, from the wording of the order of the Court of Exchequer, that Court must have considered that the interests of the children became vested immediately on the death of their mother, and he contended that such was the right construction.

Mr. *G. A. Young*, for the surviving children.—The word “divided” is the only word of bequest, and the division is evidently intended to take place upon the children attaining twenty-one, and not at the death of the tenant for life; and even if this be doubtful, the Court will lean to a division at twenty-one: *Perfect v. Lord Curzon* (a), *Torres v. Franco* (b), *Mocatta v. Lindo* (c). The share, therefore, did not vest in the deceased child, but goes on to the survivors. There is no gift here of the interim interest to the children. The case comes rather within the distinction taken by Sir *John Leach* in *Vawdry v. Geddes* (d) and *Jones v. Mackilwain* (e).—He also referred to *Hanson v. Graham* (f), *Newman v. Newman* (g), and *Fonnereau v. Fonnereau* (h).

The VICE-CHANCELLOR.—I think it probable that the existing state of things never occurred to the mind of the testatrix. I think it also probable, that, if it had occurred to her, she would have solved the question in favour of the

(a) 5 Madd. 442.

(b) 1 R. & M. 649.

(c) 9 Sim. 56.

(d) 1 Russ. & M. 208.

(e) 1 Russ. 225.

(f) 6 Ves. 239.

(g) 10 Sim. 51.

(h) 3 Atk. 645.

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surviving children. The Court, however, must be governed by the words. It seems to me that the Court of Exchequer must, in effect, have decided in favour of the vesting. Independently, however, of that circumstance, which is entitled to attention, I think, taking the whole disposition together, and especially considering that the limitation over is upon the niece dying without leaving issue, that the true construction of the will is, that the shares did vest in the children on the death of the tenant for life, and that the father must take the share of the deceased child.

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Executors held personally liable in respect of the loss to the testator's estate of a sum outstanding on personal security; although the security was that of the bond of the testator's solicitor, and the money had been invested in that security by the testator some years before his death, and by his will he directed that his trustees should get in his outstanding personal estate "as soon as conveniently might be" after his decease.

BULLOCK v. WHEATLEY.

WILLIAM CHAPPERLIN, by his will, dated the 2nd March, 1835, gave and bequeathed all such monies as should be due and owing to him at the time of his decease on mortgage, bond, or otherwise lent out on note of hand, and also the securities for the same respectively, unto Thomas Wheatley and John Carter, their heirs, executors, administrators, and assigns respectively, upon the following trusts, that is to say, upon trust that they or the survivor of them, his executors or administrators, should, as soon as conveniently might be after his, the testator's, decease, call in the same, or such part thereof as they should think proper, and lay out and invest the same in the purchase of stock in the public or government funds, or on such real security or securities as they should deem sufficient, at interest, and from time to time alter or vary such stocks, funds, or securities, at their or his discretion; and upon trust to pay the dividends or interest thereof unto his, the testator's, nephew, Robert Brown, for the term of his natural life; and, after his decease, then the testator directed that his

said trustees should stand possessed of one equal moiety of the trust fund for all and every the child or children of Thomas Bullock, deceased, who should be living at the death of the said Robert Brown, equally to be divided between them, if more than one, and the remaining equal moiety in trust for William Bullock, if then living, but if he then should be dead, in trust for his executors or administrators. And the testator appointed Thomas Wheatley and John Carter executors of his will.

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The testator died in August, 1835. In April following, the executors proved the will; and they possessed themselves of the personal estate of the testator, and paid his funeral expenses, debts, and legacies.

At the time of the death of the testator, there was due to him the principal sum of £1800, with an arrear of interest, secured to him by the bond of Thomas Lediard of Cirencester, in the county of Gloucester, who was the testator's solicitor. The bond bore date the 25th October, 1828, and was conditioned for the payment by Lediard, his heirs, executors, or administrators, to the testator, his executors, administrators, or assigns, of the full sum of £1800, with interest for the same after the rate of 4*l.* 18*s.* *per cent. per annum*, on the day next after the expiration of twelve months' notice from the testator to Lediard.

This bond appeared to have been found amongst the testator's effects in the year 1842, and not before. For some years, however, previously to that time, the executors received interest upon it from Lediard, and they handed over such interest to Robert Brown, the tenant for life under the testator's will.

In September, 1840, the executors called upon Lediard for payment of the bond debt, and upon that occasion it was agreed between the parties, that Lediard should pay the bond debt to the executors at the expiration of six months from that time, namely in March, 1841. Lediard,

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however, failed to do so, and the executors at that time took no measures to enforce payment.

In April, 1842, the executors again applied to Lediard for payment of the bond debt. The result of this application was, that the executors took from Lediard, as a security for the debt, his promissory note, dated the 23rd April, 1842, for payment (a) of the sum of £1800 on the 6th July ensuing, and delivered up the bond to Lediard, who afterwards cancelled it.

It appeared that Lediard had been in large business as an attorney, and was for many years up to the year 1842 reputed to be in affluent circumstances.

The money due on the note not having been paid, and Lediard having become bankrupt, this bill was filed by William Bullock and the children of Thomas Bullock against the executors and Robert Brown, praying that the executors might be decreed personally to make good the money, and that the same might be invested for the benefit of the persons interested therein.

Mr. Russell and Mr. Parry, for the plaintiffs.

Mr. Swanston and Mr. Baily, for the defendants, the executors, contended that their clients had acted with reasonable discretion, and that there was no rule of this Court rendering trustees liable on the mere ground that they had left property outstanding on the same personal security on which the testator had left it: Burton v. Burton (b), Garrett v. Noble (c), Ashburnham v. Thompson (d). They observed that Lediard was the testator's own solicitor, and that the testator himself had left this bond outstanding seven years, which shewed his confidence in

(a) The words "to pay" were omitted in the note.

(b) 1 Myl. & C. 80.

(c) 6 Sim. 504.

(d) 13 Ves. 402.

Lediard ; and, moreover, that, without twelve months' notice, the testator himself could not have recovered the money in an action on the bond, and that it was very doubtful whether the executors had any right of action at all, and, consequently, that they were justified in the arrangement which they had entered into with Lediard as to the promissory note, which was not necessarily to be considered as taken in satisfaction of the bond: *Davis v. Gyde* (a). They also contended that Brown was equally liable with the executors: *Trafford v. Boehm* (b), and, as to costs, cited *Taylor v. Tabrum* (c), *Baker v. Carter* (d), *Bailey v. Gould* (e).

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Mr. *Faber* appeared for the defendant Brown.

The VICE-CHANCELLOR.—Painful as this case is, I think *March 19th.* it unfortunately so clear of difficulty (an opinion confirmed by reflection, and an examination of authorities last night, and some examination of the pleadings this morning) that I ought not to cause the parties further expense or anxiety by deferring my judgment to another day.

It is plain, that, at the time of the testator's death, in 1835, Mr. Lediard was, and admitted himself to be, indebted to the testator in a principal sum of £1800, carrying interest, and that this debt was included in the bequest under which the plaintiffs claim. The executors were certainly aware of the existence of the debt as early as the year 1837, if not as early as the year 1836, and must be taken to have then known that it was comprised in the bequest just mentioned. Of this there can be no doubt. Lediard, who did not dispute his liability, made several payments of interest upon the £1800, on the footing that I have stated, in the interval between the testator's death

(a) 2 Ad. & E. 623.

(b) 3 Atk. 444.

(c) 6 Sim. 281.


(d) 1 Y. & C. 250.

(e) 4 Y. & C. 221.

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and the year 1840, interest, that is, accruing after the testator's death. The testator in his books treated the debt as a bond debt, a fact which the executors also knew in 1837, if not in 1836; and there was in truth a bond for it from Lediard to the testator, which probably was at the testator's death in his own custody in the house where he died, for it was found there in the year 1842. The executors may very possibly not have seen or looked for this bond, or known its contents, until the year 1842. But I am, I think, bound, upon the evidence before the Court, to hold, that, if in the year 1838 they were ignorant of its nature or contents, that ignorance was unjustifiable, and cannot be allowed to be alleged in their favour for any useful purpose. The tenor of the instrument is such, that, if a notice calling in the principal money was not given, as I collect none to have been given, in the testator's lifetime, it may be questionable whether it was competent to the executors to bring an action directly upon it. This, however, is a point upon which I do not give any opinion.

But I am, upon the clear and admitted facts, satisfied that the executors were entitled to maintain some suit at law or in equity against Mr. Lediard for the recovery of the £1800, with the arrears, if any, of interest. Whether they could or could not have maintained the suit, without a twelvemonth's previous notice or demand, may possibly be a question. Upon that also I give no opinion. But the executors did not at any time before the year 1842 either sue Lediard or make any demand upon him for the £1800, or obtain or ask for any security for it, or give him any notice of any kind, or threaten to sue him, except only, that, in September, 1840, they appear to have made an arrangement with him that he should pay the money in the Spring of 1841, which he did not do. The whole £1800 having under these circumstances remained due at the end of the year 1841, I think that the trustees had then certainly, if not before, committed a breach of trust



by letting it so remain, and made themselves personally answerable to the plaintiffs for it. Nothing took place in my opinion to remove or relieve them from that responsibility. The transaction, however, of April, 1842, including the promissory note and the loss of the possession of the bond, found afterwards in a cancelled state among the papers of Lediard, who became bankrupt in July, 1842, strengthened the case against the executors, if that case was capable of being strengthened. It may be true that the executors, whose integrity I do not doubt, wished and meant to act properly, and were guided by the advice of the solicitor whom the testator employed and trusted, namely, Lediard himself. This, however, though it may seem to add hardship to the case, cannot in my judgment avail them. A trustee committing a breach of trust is not protected from its consequences by the circumstance that he honestly took and followed the advice and opinion of his solicitor, whatever remedy he may have against that solicitor; nor can it make any difference, that the solicitor was also the solicitor and adviser of the author of the trust.

It may be true, that, as the executors say, Lediard was up to the time of his bankruptcy believed by them, and generally reputed and considered, to be a man of credit and substance and ample means. Neither that circumstance, nor the fact that he was, and had been from the year 1828, trusted by the testator as a debtor without security, nor the degree of delay or discretion allowed by the general rules of this Court, or by the particular terms of the will in question, (in which I do not forget the words "as soon as conveniently may be," or the words "or such parts thereof as they may think proper"), can, in my opinion, justify the course taken by the executors, or rather their omission.

It has not been suggested to me, and I have not been able to suggest to my own mind, that any advantage to the

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plaintiffs was or could reasonably have been thought likely to arise from leaving the money in the debtor's hands unsecured. The case as to Mr. Brown, the tenant for life, who was receiving four and a half *per cent. per annum*, may possibly have been different; but of course the executors were bound not to consult his interest, to the damage or at the risk of the other *cestuis que trustent*. Security was not, but of course might have been, asked for. Its refusal would have brought the matter to a crisis; and that the testator was content without security, has never been allowed to justify an executor in leaving debts due to the estate outstanding upon mere personal liability. If a year's notice before calling in the principal was, after the testator's death, necessary, it was especially imprudent in the executors neither to give such a notice nor to obtain an agreement dispensing with it, nor was it otherwise than very incautious to allow an instrument so worded as the bond to remain the only written evidence of the debt, or the only security, if security it could be called, for it. It is not necessary in this case to say, whether, during the first year, or even the first two years, after the testator's death, there was unjustifiable delay or culpable negligence, terms which I use of course technically, and not disrespectfully. But, in 1838, he had been dead three years, and I am clearly of opinion, that, in or before the year 1839, the executors ought to have placed themselves, if they were not originally, in a condition to sue, and ought either to have sued or to have obtained substantial security, or (if this could be denied or doubted) that they ought to have done so in 1840 or 1841. And upon the pleadings and evidence I consider myself not at liberty to suppose that such measures, if then taken, would have been fruitless.

I think that I ought not to direct any inquiry as to the means and circumstances of Lediard at any time between the testator's death and his bankruptcy, a period of more

than six years, during the whole or more than the first half of which he was in apparent credit and repute. He was so indeed, as I collect, up to the end of the year 1841, and still later. But I observe a passage in the answer of the executors, from which it appears, that, in February, 1842, having heard rumours as to Lediard's circumstances, they applied for payment at a future day. This renders the transaction of April, 1842, still more weighty and remarkable.

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It has been argued that there was acquiescence on the part of the plaintiffs, or some of them, in the conduct or omission of which they now complain, such as to preclude their title to relief. I think that case, however, not established. Neither act nor knowledge before the year 1840 or 1841 is proved as to either of them. Nor does that which took place in 1840 or 1841 amount to an answer to their case, or to the case of either of them. It is not shewn that either of them was then, or at any time before Lediard's bankruptcy, apprised fully or sufficiently of their rights or of the material facts or circumstances, or intended to abandon or waive any rights that they might have. The executors must (and I regret it) be declared liable for the £1800, and bring the amount into Court without prejudice to any question between them and Mr. Brown. I may add that I consider this decision to be quite consistent with *Garrett v. Noble* and *Buxton v. Buxton*.

With regard to the costs to this time, the suit has been rendered necessary by the breach of trust merely, and they must follow the event; but neither between the plaintiffs and Mr. Brown, nor between the executors and Mr. Brown, can there be any costs.

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A real estate may be devised to a married woman in fee-simple for her separate use, yet in such a manner as to disable her during the coverture from making any sale, mortgage, charge, or incumbrance to take effect against it during her life or during her coverture. Hence, where A. devised a real estate to his daughter B., a married woman, in fee, but with a declaration *that she should not sell, charge, mortgage, or encumber it*, followed by another declaration that she should take it for her own sole and separate use and benefit and disposal, and have the sole management thereof, inde-

pendent of her husband and free from his debts, &c.:—*Held*, that the prohibitory clause was not void, inasmuch as it must be taken in connexion as well with the succeeding as the preceding words; and therefore that a security, by way of equitable mortgage, executed by the husband and wife to a party who had notice of the wife's title under the will, was void as against the wife.

Feme covert is entitled under a will to an estate in fee-simple, subject to an outstanding lease for thirty-one years from June, 1816, at a rent of £60 per annum, and subject to a clause in the will prohibiting her from mortgaging or encumbering the property during coverture. In June, 1840, the husband takes an assignment to himself of the lease of 1816, and the husband and wife execute a new lease to E., as a trustee for the husband, for the term of thirty-one years, at the same rent as before. In this lease no notice is taken of the wife's separate estate, and E. enters into no covenants. In 1841, the property lets at £90 per annum. The new lease is an incumbrance within the meaning of the prohibitory clause contained in the will.

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JOHN WARREN, by his will, dated the 1st September, 1828, after devising certain real estates and bequeathing certain legacies, devised as follows:—"I give and devise unto my daughter, Alice Baggett, the wife of William Baggett the younger, all that my freehold estate situate and being on the west side of Great Windmill-street, in the parish of St. James, Westminster, with the appurtenances, consisting of the premises called the Bull-yard, in the occupation of Mr. Robert Newman, and three houses in Great Windmill-street aforesaid, being No. 42, in the occupation of — Brodie, Esq., No. 43, known by the name or sign of The Bull public-house, and No. 44, to hold the same unto my said daughter, Alice Baggett, and her heirs for ever." The testator then, after bequeathing several pecuniary legacies, gave all the residue and remainder of his estate and effects whatsoever and wheresoever to William Baggett the elder, and George Bather, their heirs, executors, and administrators, upon trust to make sale and dispose of such parts thereof as should not consist of money, and after paying and discharging all his just debts and funeral and testamentary expenses and legacies, should transfer, pay, and divide the surplus of such residue unto and among his five children (including Alice Baggett) in equal shares, the shares of the daughters to be paid into

their own proper hands respectively, for their own sole and separate use respectively, their receipts to be sufficient discharges to his executors; provided, that, if either of his said children should die in his lifetime, leaving a child or children, the share or shares of the parents so dying should go to their child or children. The testator then proceeded as follows:—"And I hereby declare, that neither of my said daughters shall sell, charge, mortgage, or encumber the estates or property by me given, devised, and bequeathed to them; and that my daughters shall have, receive, and take such estates and property, each of them, for their own sole and separate and respective use, benefit, and disposal, and have the sole management thereof independent of their husbands for the time being; and the same, or any part thereof, or the rents, dividends, or yearly produce thereof, or any part thereof, shall not be subject or liable to the debts, control, or intermeddling of their husbands for the time being; and that the respective receipts of my said daughters alone, signed by them with their hands, shall from time to time be a good and sufficient discharge for the said rents, dividends, and interest, or yearly produce and monies hereby given, devised, and bequeathed to them respectively, to the parties paying the same; and that the said estates or property shall go to such child or children, or other person or persons, in such share or shares, or manner, as they, my said daughters, shall, by their respective last will and testament in writing, or by any writing of that purport, to be executed in the presence of two or more credible witnesses, give, order, direct, or appoint the same." And the testator appointed William Baggett the elder, and George Bather, executors of his will.

The testator died on the 1st September, 1828. At the time of his death the premises called The Bull public-house, in Great Windmill-street, were subject to a lease granted by the testator, dated the 19th January, 1816, to Joseph

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Goding, for a term of thirty-one years, commencing at Lady-day, 1816, at the annual rent of £60.

By an indenture dated the 11th June, 1840, made between William John Baggett and his wife of the first part, the defendant John Evans of the second part, and William John Baggett of the third part, in consideration of the rent thereby reserved, and the covenants therein contained, William John Baggett and his wife granted, bargained, demised, and leased to Evans, his executors, administrators, and assigns, the premises called The Bull public-house, with the appurtenances, to hold the same to Evans, his executors, administrators, and assigns, nevertheless, in trust for Baggett, his executors, administrators, and assigns, from Midsummer-day then next ensuing, for the term of thirty-one years, yielding and paying during the said term to Baggett and his wife, and the survivor of them, and the heirs and assigns of the wife, the clear yearly rent or sum of £60, on the four usual quarterly days of payment.

By an indenture dated the 16th of June, 1840, Baggett took an assignment to himself of the premises comprised in the indenture of January, 1816, for the residue of the term of thirty-one years thereby created.

On the same 16th of June, Baggett deposited all the before-mentioned deeds with Sir Henry Meux & Co. by way of equitable mortgage for securing the re-payment to them of the sum of £600 with interest. He at the same time signed and delivered to them a memorandum by which he admitted that that sum had been lent by Meux & Co. to himself, and by which he engaged to execute to them an under-lease of the premises for such term as they should think fit, by way of mortgage, with powers of sale, &c., and agreed that they should have a lien on the deeds until re-payment.

The bill was filed by Mrs. Baggett, by her next friend, against Sir H. Meux & Co., John Evans, and W. J. Baggett.

It alleged that the plaintiff's husband, being in needy circumstances, did, in June, 1840, set on foot a plan or contrivance to obtain from the plaintiff the benefit of her sole and separate estate and interest in the premises in question, and, with that view, applied to Meux & Co. for a loan of £600, and proposed to secure the re-payment thereof by a lease, to be obtained from the plaintiff, of the premises to some indifferent person, in trust for her husband, and to deposit the same, when granted, with Meux & Co.: that, having entered into such arrangement with Meux & Co., her husband applied to the plaintiff, and stated and represented to her, that, as the then existing lease of thirty-one years was nearly expiring, it was very desirable that a new lease should be granted, and that a person of the name of Evans would take such new lease and give a considerable increase of rent for the same, and that it would be much to her benefit to grant such a lease: that the plaintiff, trusting entirely to the truth and good faith of such representations, and in ignorance of any such agreement for a loan having been entered into between her husband and Meux & Co., consented to join in granting such lease: and that thereupon her husband, or Meux & Co., or one of their solicitors, prepared and ingrossed, or caused to be prepared and ingrossed, a certain indenture of lease which she executed, without ever having read the same or heard the same read, and without having been made acquainted with the true purport or effect thereof. The bill then stated, that the plaintiff had lately discovered that the indenture of lease so executed was the indenture of the 11th June, 1840; and, after stating the fact of the deposit, it charged that the declaration of trust contained in the indenture of lease, in favour of William John Baggett, was a fraud on the plaintiff, and was inserted therein entirely without her knowledge or concurrence, and that she never in any manner agreed or intended to give up her separate estate and interest in the premises, or any part thereof.

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The bill prayed that it might be declared, that, by the true construction and operation of the will of the testator, John Warren, the plaintiff was restrained from disposing of her estate and interest in the premises in question by way of anticipation, and from executing any valid conveyance or disposition thereof; and that it might be declared, that the indenture of lease of the 11th June, 1840, was, therefore, void and inoperative as against her; and that it might also be declared, that it was obtained from her by undue and improper means, and ought to be delivered up to be cancelled, and that the same might be delivered up and cancelled accordingly as against her; and that it might also be declared, that plaintiff was entitled to the fee-simple and inheritance of the said premises for her sole and separate use, exclusive of her said husband, subject to the residue of the said term of thirty-one years granted by the indenture of the 19th January, 1816.

In the answer of the defendants Meux & Co., the following statements were made by Henry Neelson Smith, one of the partners :—That, in June, 1840, the defendant John Evans introduced Baggett to Sir Henry Meux, deceased, and the defendant Smith, and represented him to be the husband of the plaintiff, and to be entitled, together with the plaintiff, to the premises in question, subject to the indenture of lease of the 19th January, 1816; but that, previously to such introduction, Baggett was a perfect stranger to Smith, and, as the other defendants believed, to Sir H. Meux. That, on such occasion, Baggett stated to Smith, that he, Baggett, and the plaintiff were desirous of entering into possession of the public-house and premises, in order that he, Baggett, might therein carry on the business of a publican, for the benefit of himself and the plaintiff, and that, with that view, he, Baggett, had agreed to purchase the residue of the term of thirty-one years in the premises, created by the indenture of lease of 19th January, 1816; that he contemplated making

considerable repairs and alterations in the house and premises, but that he had not sufficient ready money for that purpose, and he requested the firm of Meux & Co. to advance and lend him £600; that he represented to Smith and Sir H. Meux that he and his wife were willing to concur in effecting any security upon the premises for the repayment of such loan and interest, and of such further debt as might become due from him, Baggett, to Meux & Co., in the course of his dealings in trade with them, which might be advised on behalf of Meux & Co. That, in consequence of such application by Baggett, Meux & Co. caused inquiries to be made by their solicitors, as to the nature of the plaintiff's interest in the public-house and premises, under the will of the testator, John Warren, and as to the truth of the other representations made by Baggett, and particularly as to the plaintiff's willingness to join with her husband in the proposed security.

All the defendants (Meux & Co.) then stated their belief that the plaintiff represented herself to their solicitors to be perfectly cognizant of the intention and design of Baggett as to the proposed loan, and as to the taking possession of and carrying on trade in the said public-house and premises, and that she confirmed his, Baggett's, representations, and expressed herself to be ready and willing to join with her husband in giving the security required by their solicitors for the said loan. That they had been informed and believed, that, after some negotiation as to the best mode of effecting such proposed security, it was ultimately agreed between their solicitors and Baggett and the plaintiff, that Baggett and the plaintiff should execute such lease of the said public-house and premises to John Evans, in trust for the defendant Baggett, as in the bill mentioned to have been executed, and to bear date the 11th June, 1840, and that such lease, when executed, should be deposited by Baggett with Meux & Co., by way of equitable mortgage for securing to the firm the re-payment of the

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said intended loan and interest, and of any further sum which might become due to them from Baggett as aforesaid, and that Baggett should also enter into such agreement to grant to the partnership firm an under-lease of premises as thereafter mentioned and set forth. They admitted, that, under the circumstances thereinbefore mentioned, Baggett and the plaintiff applied to the firm of Meux & Co. for a loan of £600, and proposed to secure the re-payment thereof by a lease to be granted by him and the plaintiff, but not otherwise to be obtained from the plaintiff, of the said public-house. They then alleged that the same amount of rent, and no more, was intended to be, and is, reserved by the lease of 11th June, 1840, as was reserved by said lease of 19th January, 1816; and they believed that the lease of 11th June, 1840, was executed by the plaintiff in pursuance of such arrangement, and with a view of enabling the plaintiff and her husband to take the said public-house for the purpose of residing and carrying on business therein for their joint benefit; however, &c. The defendants then traversed the allegations of the plaintiff's bill as before set out, and added that they had been informed and believed that the plaintiff was well aware of such plan and agreement for a loan having been entered into between Baggett and the firm of Meux & Co., and that she perfectly understood the object of the said plan or agreement, and particularly the purpose for which the new lease was to be granted, and that she fully approved of such object and purpose, and was willing and anxious that the loan should be obtained from Meux & Co. by the means and for the purposes therein set forth.

The plaintiff entered into no evidence.

The defendants Meux & Co., in support of their case, examined the defendant Evans and Mr. Hunter, their solicitor. These witnesses completely established the case made by the answer. From the evidence of the former, it appeared that he had introduced Baggett to the clerk of

Messrs. Meux & Co. in consequence of a previous arrangement with the plaintiff and her husband, which had been made at a meeting at which the plaintiff was present, and joined in the proposals for the loan. The witness Hunter proved that the nature of the security to Meux & Co. was fully explained to, and understood by, the plaintiff, and that she entirely concurred therein. A Master in Chancery was likewise examined upon the latter point, and his evidence, as far as it went, corroborated that of the last witness.

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Mr. *Swanston* and Mr. *Busk*, for the plaintiff, cited *Bennet v. Davis* (a), *Morgan v. Morgan* (b), *Tullett v. Armstrong* (c), *Jackson v. Hobhouse* (d).

Russell and *Freeling*, for the defendants Messrs. Meux & Co.—Had the clause against anticipation ended with the words “And I hereby declare that neither of my said daughters shall sell, mortgage, charge, or encumber the estates or property by me given, devised, or bequeathed to them,” it could not have been doubted that the prohibition was void; and we submit, that the proviso restraining anticipation will make no difference. The testator gives an estate in fee to his daughter, and to such a gift, although to a married woman, a subsequent proviso against anticipation will not attach: it is contrary to the whole policy of the law. There is no case precisely like the present, but the observations of Lord *Alvanley* in *Bradley v. Peiroto* (e) are in point. His Lordship says—“In all these cases the gift stands, and the condition or exception is rejected. In this case, therefore, I am under the necessity of declaring that this is a gift with a qualification inconsistent with the gift, and the qualification must there-

(a) 2 P. W. 316.

(d) 2 Mer. 483.

(b) 5 Madd. 408.

(e) 3 Ves. 325.

(c) 4 M. & C. 393.

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fore be rejected. This is not like *Socket v. Wray*, for there the gift was to a feme covert *for life*, and then to such uses as she should by will appoint. She could only appoint by will, and could not bind her executors by any deed in her lifetime; and I declared, in determining that case, that I should think otherwise in the case of a man or *any person* having an *absolute interest*." His Lordship's impression therefore was, that a clause restraining anticipation, co-extensive with an absolute gift in fee to a feme covert, was void. A clause of that nature occurs in the present case; in addition to which the testator has, in express terms, said two contradictory things; for he has said that the daughters shall not alienate, and yet that the estate shall be at their *disposal*. The word "disposal" can have no meaning if the two clauses are used together, and as applicable to the same property; for how can it be said that they shall not sell or encumber, and, at the same time, have the disposal of the property?

Mr. *Hislop Clarke*, for the defendant Evans.

Mr. *Grove*, for the defendant Baggett.

Mr. *Swanston*, in reply.

In the course of the argument the following cases were also mentioned:—*Barrymore v. Ellis* (a), *Brown v. Bamford* (b), *Moore v. Moore* (c), *Fettiplace v. Gorges* (d).

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THE VICE-CHANCELLOR.—How upon the authorities, (including *Jackson v. Hobhouse*), or upon the ordinary principles of the Court protecting purchasers for valuable consideration without notice, this cause would have stood if

(a) 8 Sim. 1.

(b) 11 Sim. 127.

(c) Ante, p. 54.

(d) 1 Ves. jun. 46.

Mr. Warren's will had been concealed, or actual fraud of any kind had been alleged and proved against the plaintiff, it is unnecessary to consider, for there is no such issue.

I am of opinion that the defendant Mr. Evans, and it is plain and admitted that all the other parties to the transactions in question, which took place in June, 1840, had, in and throughout those transactions, from the beginning, complete notice of the will, and complete notice that the plaintiff's title was under it. The main question argued has been, and the main question for decision is, whether, according to the true construction of the will, the lease of 11th June, 1840, is sustainable against her. It appears from the will that all the testator's daughters, including the plaintiff, were under coverture at the time when it was made, and that the plaintiff was then the wife of her present husband. The defendants Messrs. Meux & Co., by their counsel, have argued, that, had it ended with the words "And I hereby declare that neither of my said daughters shall sell, mortgage, charge, or encumber the estates or property by me given, devised, and bequeathed to them," the prohibition would have been, as to the property in question in this suit, void. That is so: the plaintiff would not then have had it to her separate use. But they have also contended that the prohibition is unavailing, even as the will stands; on the grounds, that (as argued) the words have no substantial connexion with the provision following them, by which the daughters' interests are made, or declared to be, independent of their husbands, and that, as also argued, such a clause against alienation is, as to the plaintiff, inconsistent with the absolute gift said to be made by the will of the property in question to her, and not more effectual in her case than it would be had the devisee been a man, or never married. To these arguments I find myself unable to accede.

The prohibition against selling, mortgaging, charging, or encumbering is immediately followed by a provision,

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forming, in truth, part of the same sentence or clause with the prohibition, and declaring that the daughters shall have, receive, and take “such estates and property, each of them, for their own sole, separate, and respective use, benefit, and disposal, and have the sole management thereof independent of their husbands for the time being.” I do not perceive any sufficient reason for not construing these two unseparated parts of the same sentence or clause, in association and connexion together; or for attributing any degree of importance to the order of precedence between them: the question is, what is the intention to be reasonably collected from the whole? The testator says, “I hereby declare, that neither of my said daughters shall sell, mortgage, charge, or encumber the estates or property by me given, devised, and bequeathed to them.” The gift of the estate in question to the plaintiff (one of those daughters) is composed, not more of the mere devise of it to her in fee, which precedes, than of the provision that she shall have it for her separate use independently of her husband, which immediately follows, that prohibitory declaration. Neither the extension of that declaration, if it does extend, both to her share of the residue given to her separate use by an earlier part of the will, and to the estate now in dispute, nor its efficacy or sufficiency as to her share of the residue directed to be paid into her hands, is, in my opinion, material to the question before me; it being plain, in my judgment, upon the whole will, that the prohibition was meant to apply, and ought to be read as applying, to her separate interest in the real estate, devised to her as real estate. But even so, it is, as I have said, contended against her, that the prohibition is void or ineffectual, as to this property, on the ground of her absolute interest in it; a distinction being argued to exist between such a case and the case of a mere life annuity or life interest.

It must, however, be remembered, that, in the language, whether of Lord *Thurlow* or of Lord *Eldon*, used by Lord

Eldon in *Jackson v. Hobhouse* (a), “a feme covert having power to alien is a mere creature of equity, to the extent to which the settlement constitutes her a feme sole, and no further;” and that Lord *Cottenham*, in *Tullett v. Armstrong* (b), says, “When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a feme sole, as to bring with it all the incidents of property, and that she might, therefore, dispose of it as a feme sole might do, it was found, that, to secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation.” [His Honor also read the subsequent observations of Lord *Cottenham*, to the words “equally upon the other.” See 4 *Myl. & C.* 393, 394.] Again, in the same case (c), Lord *Cottenham* says, “When this Court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate, and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation.”

Now, it being clear and admitted on all hands, that, with respect to a life interest given to a married woman for her separate use, she may be effectually restrained from doing, during her coverture, any act of alienation, total or partial, (without any clause of forfeiture, and without any limitation over taking effect upon such an act),—it being clear, as I apprehend, that a clause prohibiting alienation or anticipation by a married woman of her separate estate, (when there is no such provision of forfeiture or limitation over),

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(a) 2 Mer. 487.

(b) 4 M. & C. 393.

(c) Id. 405.

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however the prohibition may be expressed, whether in terms confining it to a period of coverture, or in terms general and undefined, or in terms distinctly expressing a period beyond as well as during coverture, has by law validity allowed to it, as to a life interest, at least, but that this validity is by the same law (whatever the expressions) not permitted to extend to a period beyond coverture, (that is, the law, of its own force, preventing the restriction from operation or effect as to any act done when coverture does not exist),—I am at a loss to discover any sufficient reason why that which holds good as to a life interest should not equally hold good as to an absolute estate. Why should there be any difference?

That, during the existence of a life estate in land, the reversion or remainder in fee expectant upon it should be so settled or limited as to be for the whole period in contingency, is neither illegal nor unusual. Many cases at once suggest themselves, in which, during the continuance of a tenancy for life, the inheritance is substantially incapable of being dealt with. It may be said that there is no reversion or remainder in the present instance. Still, considering what those rules are which all the counsel in this cause join, and in my judgment correctly join, in admitting as established with regard to the rights and powers of women in respect of their property, there is not, I think, anything more anomalous than those rules, or more at variance with general principle than those rules, or not entirely consistent with them, in holding, as I do hold, that a real estate may be well devised to a married woman in fee-simple for her separate use, but in such a manner as to disable her during her coverture from selling, mortgaging, charging, or encumbering her interest in it, by any act *inter vivos*, or, at least, from making any sale, mortgage, charge, or incumbrance to take effect against it during her life, or during her coverture. That, in my opinion, is the case here. The clause enabling the plaintiff expressly to

make a will (which, by the way, is not without operation, for it may enable her to affect the legal estate; and in 1828, when her father's will was made, the mention of two witnesses was not immaterial) does not, I conceive, make any difference for the present purpose. Subject or not subject to the lease in question, the property is devisable by her, and, if she shall become a widow, will be then absolutely at her disposal *inter vivos*, or by devise. I think that it has not hitherto been at her disposal *inter vivos*.

I am reminded by the word "disposal" of an argument from the bar, which was founded on that expression in Mr. Warren's will. It is of more than one meaning, and was not, I conceive, used by him in the sense in which I have used it. I think that he used it (and correctly) in the sense of regulation, ordering, conduct, government, as meaning by it little, if anything, more than he afterwards describes by the word "management." It would, as I consider, be erroneous and unreasonable to construe it in a manner contradictory to the prohibition of any sale, mortgage, charge, or incumbrance, contained in the same sentence or clause.

Is, then, the title alleged against the plaintiff by Messrs. Meux & Co., claiming through her husband under the deed of 11th June, 1840, a title founded on a sale, mortgage, charge, or incumbrance by her? Was the deed an act of that nature on her part? I think that these questions, or this question, must be answered in the affirmative. Substantially, the sole view, the single object of the transaction, was to create a security to Messrs. Meux for money lent or to be lent by them. The dates of the several instruments of June, 1840, the pleadings, and the evidence plainly shew it. [His Honor here read the passages from the answer of Messrs. Meux & Co. which are set out, *supra*, p. 142, and observed that they were corroborated by the evidence of Evans and Hunter.] But, without resting exclusively on this, must not the lease of itself, however

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intended. he considered as coming within the prohibition? The former lease granted in 1816 by the testator to Goding, at the yearly rent of £60, and acquired by the plaintiff's husband in June, 1840, will not expire until 1847. The rent reserved by the lease of 1840 in question, granted for a term of thirty-one years from Midsummer-day, 1840, but not reciting or noticing the existence of the demise of 1816, or the testator's will, or the plaintiff's title to have the property to her separate use, is not more than £60 *per annum*, and is made payable to the plaintiff's husband and herself, and the survivor of them, and the heirs and assigns of the plaintiff. £60 *per annum*, considered as rent upon a lease for thirty-one years in possession, commencing in 1840, was probably then, and is probably now, substantially below the yearly value of the property, which appears to have been let in 1841 at £90 *per annum*. Evans, the lessee, in the lease of 1840, who is declared by it to be a trustee of it for the plaintiff's husband, takes away from the plaintiff, of course, by virtue of it, upon that trust, the rent reserved in 1816 for the residue of the term demised in 1816. There are in it stipulations between the husband and wife as to matters which are usually subjects of a lessee's covenants; but Evans does not enter into any covenant whatever. Must not such a lease as this, under the circumstances belonging to it, whether including or not including the act or intention of making it a security to Messrs. Meux & Co., be considered, according to a just and rational interpretation of the testator's words applied to such a subject, if not a sale, a charge at least, or an incumbrance? Upon reflection, I do not doubt it; and I must declare the deed void in equity, against the plaintiff, and direct it to be delivered up and the term demised by it to be assigned to a trustee for the purpose of protecting the freehold and inheritance. The husband must be made liable to the plaintiff's costs to this time. As between the plaintiff and Mr. Evans, there can be no costs to this time.

As between Messrs. Meux & Co. and the plaintiff, they must pay her the general costs of the suit to this time, except as those costs have been increased by means of the allegations and charges, which she has made, of ignorance on her part and of deception and contrivance against her, and of misrepresentations to her; and so far as the costs have been increased by such means, they are to receive them from the plaintiff.

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THE plaintiff not desiring any account or direction as to the rents of the premises comprised in the indenture of lease of the 11th June, 1840, declare that such lease is void in equity against the plaintiff. Let the defendants Meux & Co., within six weeks, deliver up the lease of the 11th June, 1840, to J. W., (the plaintiff's next friend), in trust for the purposes of the will. Let the defendant John Evans, within six weeks, assign the said lease for the unexpired residue of the term of thirty-one years created thereby, free and clear of all claims and demands of the defendants, or any of them, or any person or persons claiming under them or any of them, to the said J. W., in trust for the plaintiff according to her beneficial estate and interest therein, under the said will, and subject to the restrictions imposed by the said will. Refer it to the Master to settle such assignment in case the parties differ, and let all proper parties join in such assignment, as the Master shall direct. And let the plaintiff's next friend pay the defendant John Evans his costs of the assignment. Let the defendants Meux & Co. and William John Baggett pay the plaintiff's costs of this suit to this time, subject as after mentioned as to the defendants Meux & Co. Let the plaintiff's next friend pay to the defendants Meux & Co. their costs to this time, so far as those costs have been increased by means of the allegations and charges in the plaintiff's bill, of ignorance on the part of the plaintiff, and of deception and contrivance against her, and of misrepresentations to her. Refer it to the taxing Master to tax the plaintiff her costs, and such costs of the defendants Meux & Co., accordingly, and let them be set off against each other. Reserve liberty to all parties to apply.

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Tenant for life of a manor in which lands are enfranchised under the provisions of the Manorial Rights Commutation Act is entitled to his costs out of the fund arising from the enfranchisement.

Ex parte THE ARCHBISHOP OF CANTERBURY.—In the Matter of THE MANORIAL RIGHTS COMMUTATION ACT.

BY the stat. 4 & 5 *Vict.* c. 35, s. 56, for the commutation of manorial rights, lords of manors, whatever be their interest therein, are empowered to enfranchise any of the lands holden of the manors, in consideration of such sum or sums of money, payable either forthwith or at a future time, as shall be agreed to be paid by the tenant whose lands are to be enfranchised.

By the 58th section of the act the expenses of every agreement for enfranchisement are to be borne by the lord and tenants in such proportions as they may agree, or in default of agreement as the commissioners may direct; provided always, that the expenses payable by lords of manors having particular interests or being trustees shall, with any other expenses they may reasonably incur in or about any such agreement, the amount of such last-mentioned expenses being subject to the approval of the commissioners, be paid out of the first monies to be received out of the enfranchisements to be effected under the act.

By the 69th section, lords of manors having particular interests, or being trustees, may, with the consent of the commissioners, charge the costs and expenses, paid by them in respect of the commutation or enfranchisement, on the manor.

The 73rd section enacts that all monies to be paid for enfranchisement shall be paid to the lord of the manor, his heirs or assigns, where he shall be absolutely seised as tenant in fee-simple in possession of the manor, or where, as trustee for sale or otherwise, he has power to give an effectual discharge for such monies; and where the lord shall be only entitled for a limited estate or interest, or shall be under any legal disability, such money shall, if it exceed £200, be paid into the Bank, in the name, and with the

privity, of the Accountant-General of the Exchequer, there to remain until the same shall by order of that Court made upon the petition of the party who would have been entitled to the rents and profits of the manor, had no such enfranchisement been made, be applied in the discharge of incumbrances affecting the manor, or in the purchase of lands to be settled to the like uses; and in the meantime the same money may by order of the said Court, upon application thereto, be invested by the said Accountant-General in his name in the purchase of £3 per Cent. Consolidated Bank Annuities, or £3 per Cent. Reduced Annuities; the dividends in the meantime to be paid to the person who would have been entitled to the rents and profits of the manor if no enfranchisement had been made.

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By an indenture dated the 23rd December, 1843, to which a commissioner under the act was a party, the Archbishop of Canterbury, as lord of the manor of Lambeth, in consideration of £1239, paid into the Bank of England under the 73rd section of the act by R. P. Roupell, a tenant of certain copyhold lands holden of the manor, conveyed those lands to Roupell and his heirs clearly and absolutely enfranchised and discharged from all customary payments, suits of Court, services, &c.

The Archbishop now presented his petition, praying that the costs of paying the purchase-money into the Bank, and of this application, might be taxed, and that the same when taxed might be paid out of the sum of £1239, and that the residue of that sum might be invested in the purchase of £3 per Cent. Reduced Annuities in the name of the Accountant-General, and placed to a certain account, and that the dividends might be paid to the petitioner during his life, and after his decease to the Archbishop of Canterbury for the time being.

Mr. *Wigram*, for the petitioner, submitted, that, though there was no clause in the act directly authorizing the pay-

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ment of the costs as prayed by the petition, yet, taking the whole act together, the Court had jurisdiction to award such costs. He observed that the enactments in this case were more extensive than those in *Ex parte Pasmore (a)*.

The VICE-CHANCELLOR said, that, looking at the whole scope of the act, he was of opinion that he had jurisdiction to make the order as prayed.

Order accordingly.

(a) 1 Y. & C. 75.

March 21st.

JONES v. WILLIAMS.

Upon the construction of a will—*Held*, that the effect of general words of charge at the commencement was not cut down by subsequent words.

THOMAS JONES, by his will, dated the 18th September, 1816, directed all such debts as should be due and owing by him to any person or persons whomsoever, by specialty or simple contract, or otherwise howsoever, at the time of his decease, as also his funeral expenses and the expenses of proving his will, to be paid; and, in aid thereof, he directed that the money arising and to be paid for the purchase of the premises called Caerallt, otherwise Brynhyfryd, in the parish of Llanbeblig, in the county of Carnarvon, which he had lately sold to the Governors of Queen Anne's Bounty, and also the principal and interest due to him from the late Joseph Williams of Glanrafon, in the said county of Carnarvon, Esq., deceased, should be applied for that purpose. And he thereby devised unto his wife Sydney Jones, her heirs and assigns for ever, his messuage or dwelling-house, with the lands, hereditaments, and premises thereto belonging, in the parish of Llanbeblig, called Tyny Gorse, in the occupation of Owen David, in trust to sell for the most money that should be reasonably gotten for the same, and to apply the money arising

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by such sale in further aid and discharge of his said debts. And the testator also gave and devised unto his said wife and her assigns his messuage or tenement, lands, hereditaments, and premises, with the appurtenances, situate in the parish of Llanbeblig, called Castellmai, to hold to his said wife and her assigns for her life without impeachment of waste, subject, however, to the mortgage for securing the re-payment of £500 and interest affecting the same; and after her decease, he devised the same, subject as aforesaid, unto his daughter Anne Jones, her heirs and assigns. The testator then devised certain leasehold messuages in the town of Carnarvon and parish of Llanbeblig, as to one moiety, to his wife for life, and, as to the residue, to his daughter Anne, her heirs, executors, administrators, and assigns. He also devised an estate at Llangollen to his daughter, her heirs and assigns: and he bequeathed to her absolutely certain leasehold property in the town of Llanrwst. He then bequeathed certain specific monies and certain plate to his wife; and after giving to his daughter for her life a silver tankard and two silver goblets, which were presented to him by the Carnarvonshire Agriculture Society, and directing, after her decease, that *the same should remain at Castellmai as heir-looms*, he gave the remainder of his plate to his daughter. And he bequeathed the residue of his personal estate to his wife and daughter in certain proportions.

Upon the death of the testator, a bill was filed in the Chancery Court of the Great Sessions for the several counties of Anglesey, Carnarvon, and Merioneth, by Jane Jones, a specialty creditor, and Palfrey Rowlands, a simple contract creditor of the testator, on behalf of themselves and all other the creditors, for the administration of the testator's assets. By the decree made on the hearing of the cause in that Court, it was referred to the Master to take the usual accounts of the testator's debts, and it was ordered that the testator's personal estate not specifically bequeathed

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should be applied to pay the plaintiff and all others, the testator's creditors, in a course of administration, and then to pay his funeral expenses; and in case the testator's personal estate should not be sufficient for that purpose, it was declared that the testator's messuage called Tyny Gorse, devised by his will to Sydney Jones and her heirs, to be sold for the payment of his debts, ought to be sold for that purpose; and it was ordered, that the registrar should take an account of the rents and profits of the said messuage come to the hands of Sydney Jones, &c., and that out of the said rents and profits, and the money arising by such sale of the messuage, the testator's debts remaining unpaid should be paid *pari passu*. And it was ordered, that, in case the several funds aforesaid should not be sufficient for the payment of the testator's debts, the registrar should take an account of the specific legacies given by his will, and that the same should contribute in proportion to the payment of his debts; and in case the debts of any of the testator's creditors by specialty should exhaust his personal estate, they were to receive nothing out of his real estate until the simple contract creditors were made up equal with them; and in case the aforesaid several funds should not be sufficient for the payment of the testator's debts, the Court declared that the real estates devised by his will to the devisees therein named should be subject, in proportion, towards further satisfaction of his debts which affected the same. And it was ordered, that the same, or so much thereof as should be sufficient for the payment of the said debts which affected the same, should be sold accordingly, &c. And the registrar was to settle the proportions to be borne between the respective devisees of such estates; and out of the money arising by such sale, the said testator's debts affecting the said last-mentioned estates were to be paid. And if all such several funds should still be insufficient for the payment of the said testator's debts, the registrar was to take an account

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of the rents and profits of the said last-mentioned estates received by said defendants, or any or either of them, &c., and charge the said defendants therewith, and apply the same towards satisfaction of such aforesaid debts affecting the said last-mentioned estates as should so remain unpaid; and in case any of the said testator's creditors whose debts affected such last-mentioned estates should have exhausted any of the before-mentioned funds, the said testator's other creditors were to stand in their place and receive a satisfaction *pro tanto* out of the money arising from said last-mentioned estates.

After some proceedings had been had under this decree, the plaintiff Jane Jones died; whereupon a bill of revivor and supplement was filed by her personal representative in the Court of Exchequer, to which bill Palfrey Rowlands was made a defendant; and by a decree made in that Court in July, 1835, it was ordered, amongst other things, that the decree of the Chancery Court of Great Sessions should be carried on and prosecuted between the parties to the then present suit, in the manner as by the said decree directed between the parties to the original suit.

The cause now came on for hearing for further directions, and one of the questions was, whether the testator had charged all his real estates with the payment of his debts.

Mr. *Temple* and Mr. *Renshaw*, for the plaintiffs.

Mr. *Simpkinson* and Mr. *Cockerell*, for another creditor of the testator.

Mr. *Russell* and Mr. *Cankrien*, for the testator's daughter and her husband, contended, first, that the Castellmai estate was not charged by the will with the payment of the testator's debts; for that the general charge at the beginning of the will was cut down by the subsequent expressions; from which it appeared that only certain specified real estates were to be applied "in aid" of the personalty for

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that purpose : *Douce v. Lady Torrington* (a), *Thomas v. Britnell* (b), *Palmer v. Graves* (c) ; all which cases were recognized and approved by Lord *Lyndhurst* in *Price v. North* (d). Secondly, that, whatever might be the true construction of the will, the expressions “affect the same” and “affecting the said last-mentioned estates,” which were used in the decree in reference to the devised estates, shewed that the Court of Great Sessions considered that there were some debts which did not affect the devised estates ; and the decree in that respect, not having been appealed from, must stand.

In the course of the argument the *Vice-Chancellor* referred to *Graves v. Graves* (e) and *Cornewall v. Cornewall* (f).

The VICE-CHANCELLOR.—Upon the question of construction, without expressing or intimating either assent or dissent as to the cases of *Douce v. Lady Torrington* and *Palmer v. Graves*, I am of opinion, upon this will, that there is at the commencement of it, plainly expressed, an intention to charge all the property with all the debts, and that the following parts of the will do not contain any sufficient indication of a contrary intention ; and, therefore, according to the true construction, whatever might be the order of precedence in which the testator considered the property chargeable, all the property is charged. The doubt, however, which presses upon my mind is, whether I can give effect to this construction consistently with those expressions in the decree to which my attention has been called. Upon that I will hear the plaintiffs’ counsel.

Mr. Temple.—The expressions in question have reference

(a) 2 M. & K. 600.

(b) 2 Vez. sen. 313.

(c) 1 Keen, 545.

(d) 1 Phillips, 87.

(e) 8 Sim. 43.

(f) 12 Sim. 298.

no doubt, to mortgage and specialty debts, those debts at law affecting the realty ; but the effect of them is not to exclude the operation of the general charge, at the commencement of the will, upon the residue of the real property which may be left after payment of the mortgages and specialty debts.

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The VICE-CHANCELLOR.—If the cause had been originally before me, I should have dealt with the will in this case as the will in *Graves v. Graves* was dealt with. I regret to say, however, that I find myself unable to surmount the language of the decree, especially the last words. All I can do is, not to carry the declarations contained in it farther.

MOSTYN v. MOSTYN.

March 21st.

By the settlement made previous to the marriage of Samuel Mostyn and Jane Thomas, dated the 9th June, 1789, the sum of £3300, being the fortune of the wife, was assigned to Paul Panton and Thomas Crew, their executors, &c., upon trust, after the solemnisation of the marriage, to pay the interest and produce thereof to the husband for his life; and from and after his decease, to the wife for her life; and then the settlement proceeded in these words: “And By the marriage settlement of A. and B., a sum of £3300 was assigned to trustees upon trust for the husband and wife for their respective lives; and after the decease of the survivor of them, in case there should be any child or children of their bodies then living, to pay the said sum unto such child or children which should be then living, in such shares &c. as the husband and wife should jointly appoint; and for want of such appointment, the same was to go and be equally divided among such children, if more than one, as should not be inheritable to the real estate of the husband, share and share alike, and to be paid to him, her, or them, at his, her, or their respective age or ages of twenty-one years or days of marriage, which should first happen; and in case there should be no such child or children living at the time of the death of the survivor of A. and B., or, if such, and they should all happen to die before their respective ages of twenty-one years or days of marriage as aforesaid, then the said sum was to go to such person or persons as B. by deed or will should appoint. A. and B. died without executing the joint power of appointment, having had several children, some of whom survived them:—*Held*, that a son of the marriage who attained twenty-one, but died, without having been married, in the lifetime of one of his parents, acquired a vested interest in the fund, but that two children who died infants and without having been married, in their parents’ lifetime, were excluded from the fund.

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from and after the decease of the survivor of them the said S. Mostyn and Jane his intended wife, in case there shall be any child or children of their bodies between them begotten then living, then upon further trust that they the said Paul Panton and Thomas Crew, and the survivor of them, and the executors, administrators, or assigns of such survivor, shall pay, apply, and dispose of the said principal sum of £3300, and the interest or produce that may be had or made thereof, unto and among such child or children which shall be then living, in such parts, shares, and proportions, and upon such conditions, manner, and form, as they the said Samuel Mostyn and Jane Thomas, by any their joint deed or deeds in writing, to be by both of them duly executed and attested in the presence of two or more credible witnesses, shall give, direct, limit, or appoint the same; and for want of such gift, limitation, and appointment, that the same shall go to and be equally divided among such children, if more than one, of the said Samuel Mostyn and Jane his intended wife, as shall not be inheritable to the real estate of the said Samuel Mostyn hereby agreed to be settled in manner herein mentioned, share and share alike, and to be paid to him, her, or them, at his, her, or their respective age or ages of twenty-one years or days of marriage, which shall first happen; and in case there shall be no such child or children living at the time of the death of the survivor of them the said S. Mostyn and Jane his intended wife, or, if such, and they shall all happen to die before their respective ages of twenty-one years or days of marriage as aforesaid, then and in such case upon further trust to transfer and assign, as well the said principal sum of £3300 as all securities as shall be then taken for the same, to such person or persons, and to and for such uses, trusts, intents, and purposes, and under such conditions, as she the said Jane Thomas, notwithstanding her said intended coverture, and as if she were a feme sole, shall, by such her deed in writing, or last will

and testament to be by her so executed and attested in manner aforesaid, give, dispose, direct, limit, and appoint the same." In default of such last-mentioned appointment, the fund was to go to certain persons named, who were the collateral relatives of Mrs. Mostyn.

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The indenture then contained a covenant on the part of the husband for settling various real estates in Flintshire, of which he was seized in tail and in fee, upon himself for life, with certain provisions for his wife, with remainder to his issue in tail, with remainder to himself in fee, in the usual way of settling estates in that neighbourhood, with a power to the trustees to apply the £3300 in paying off incumbrances and to pay the surplus to the husband, taking securities on the estates for the sums so paid.

The marriage took effect, and there were seven children of the marriage, of whom four, namely, Robert John, Mary Margaret, Samuel Johnson, and Thomas, attained the age of twenty-one, and were living at the hearing of this cause; one, namely, John Henry, attained the age of twenty-one, but died intestate, without having been married, in the lifetime of his mother; and the other two, namely, Jane and Margaret, died infants, and without having been married, in the lifetime of both their parents.

Mr. and Mrs. Mostyn never executed the joint power of appointment of the £3300 given to them by the settlement, and they died, the former in November, 1819, and the latter in April, 1836.

Under an indenture dated the 5th July, 1816, made in pursuance of the settlement, Robert John Mostyn became first tenant in tail of the settled real estates. By the same indenture those estates became charged with part of the sum of £3300 which had been advanced by the trustees for the payment of incumbrances, and certain terms of years were assigned to the trustees for securing the repayment of those sums.

The bill was filed by Thomas Mostyn against Robert

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John Mostyn, the trustees of the £3300, and certain persons alleged to be subsequent incumbrancers on the real estates, charging that the £3300 was divisible equally amongst the three younger children of Mr. and Mrs. Mostyn, who survived their parents, that two of these children had received their shares, and that the plaintiff, as the other of these children, ought to be paid the remaining share.

The question upon the hearing of the cause for further directions was, whether the plaintiff's construction of the settlement was right, or whether, in the events that had happened, John Henry, or the deceased infants, took any interest under it in the £3300. The plaintiff had taken out letters of administration of the effects of John Henry, but no administration had been granted in respect of the infants, and they were consequently unrepresented in the cause.

Mr. *Russell* and Mr. *Terrell*, for the plaintiff, contended, that the joint power of appointment, given to the husband and wife by the settlement, only extended to younger children living at the death of the surviving parent, and that the limitation over in default of appointment only included the same children; consequently, that John Henry Mostyn and the deceased infants took no interest in the fund in question. They referred to *Woodcock v. Duke of Dorset* (a), *Hope v. Lord Clifden* (b), and the observations of Sir Thomas Plumer in *Howgrave v. Cartier* (c).

Mr. *Wigram* and Mr. *Heberden*, for the defendant Robert John Mostyn.

Mr. *T. H. Hall*, for the defendants the trustees.

It was noticed during the argument that there were no

(a) 3 Bro. C. C. 569.

(b) 6 Ves. 499.

(c) 3 Ves. & B. 79, see p. 85 =
 Coop. 66.

representatives of the deceased infants before the Court, but no objection was taken on that ground.

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THE VICE-CHANCELLOR.—The Court must read settlements of this description with an inclination to believe that there was an intention to provide for children at a time when a provision would be required, namely, at twenty-one, or marriage. If the expressions are doubtful, that inclination will prevail; but if there be a clearly expressed intention, that intention, so clearly expressed, must be abided by. Such I have always understood to be the doctrine on this particular subject. Now in this case the £3300 is to be for the husband and wife for their lives respectively, and afterwards to be paid “unto and among such child or children,”—it is not even said of the marriage, but that cannot be doubted,—“which shall be then living, in such parts, shares, and proportions, and upon such conditions, manner, and form, as they the said Samuel Mostyn and Jane Thomas, by any their joint deed or deeds in writing, to be by both of them duly executed and attested in the presence of two or more credible witnesses, shall give, direct, limit, or appoint the same.” Therefore the husband and wife could not appoint to any child except a child fulfilling the condition of survivorship; according to the ordinary meaning of the words used. “And for want of such gift, limitation, and appointment,” which is the event that has happened, “the same shall go to and be equally divided among such children, if more than one, of the said Samuel Mostyn and Jane his intended wife, as shall not be inheritable to the real estate.” Now, in strict construction, according to all propriety of phraseology, the “such” and the “as,” here, are the two words connected together; the “such” is not connected with any previous word. Admitting that it would have been connected with the previous description or designation, if nothing had followed, here it is followed by a word to

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which alone, and to nothing that has gone before, it strictly and properly, according to the right use of language, belongs. If the intention required it, correct rules of phraseology might be departed from; but I am here asked to depart from those rules, for the purpose of contradicting that which it ought to be the inclination of the Court to believe was intended, and therefore I do not think myself warranted in not reading the words as used according to the correct rules of language. Reading the word "such" as I have read it, and as in point of correct writing it ought to be read, there is no condition of survivorship in default of appointment at all. The fund in question is to go to all the children not inheritable. Then, after a provision as to minority and marriage, that I shall notice presently, comes the provision, "that, in case there shall be no such child or children living at the time of the death of the survivor of them the said Samuel Mostyn and Jane his intended wife,"—which has not happened,—“or, if such,”—which has happened,—“and they shall all happen to die before” twenty-one or marriage,—which has not happened,—“then and in such case upon further trust to transfer and assign, as well the said £3300 as all securities as shall be then taken for the same, to such person or persons, and to and for such uses, trusts, intents, and purposes, and under such conditions, as she the said Jane Thomas, notwithstanding her intended coverture, and as if she were a feme sole, shall, by such her deed in writing, or last will and testament, to be by her so executed and testified in manner aforesaid, give, dispose, direct, limit, and appoint the same,”—and there the Master stops: but the ulterior trusts, in default of appointment by Jane Thomas, are for collateral relatives, as I read the settlement; and therefore, if this settlement receives the interpretation that a child could not take a vested interest unless surviving the parents, there being no appointment, and no child had been living at the death of the survivor, although there

had been twenty grandchildren, the property would go over to collaterals. We need not, however, closely consider what would have been the case under such circumstances, because the circumstances have not happened. I am of opinion, according to the rules applied to such a subject in all the cases now considered as of binding authority, in whatever way the fund would have gone if no child had survived the parents, that, as several children have survived the parents and attained majority, a child attaining majority, but not surviving both parents, did acquire a vested interest in a share. The next question, then, is, what share?

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The trust is for the children, but to be paid at twenty-one, or marriage, which word "marriage," be it observed, applies to sons as well as daughters; and, therefore, a son marrying under twenty-one would, as to vesting, stand on the same footing as a son attaining twenty-one, which, like many other parts of this settlement, is not usual. The words may or may not import a vesting on birth, according to circumstances. You must look at the rest of the settlement, to see whether they import mere payment or vesting. I find in a subsequent part of the settlement, and in fact very near these words,—forming almost part of the same clause,—this declaration: "that, in case there shall be no such child or children living at the time of the death of the survivor of them the said Samuel Mostyn and Jane his intended wife, or, if such, and they shall all happen to die before their respective ages of twenty-one years or days of marriage," the fund is to go over. I think that this may be fairly taken as a sufficient indication of intention that the age of twenty-one or marriage was to be the period of vesting. Therefore, I think that the two children who died minors, (living their parents), without having married, did not acquire vested interests, and I am not disposed to insist upon the presence of their representatives.

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Mr. *Hall*, for the trustees, then suggested that his clients were not safe in the absence of the personal representatives of the deceased infants.

The VICE-CHANCELLOR said, that, had he not supposed the objection as to parties waived, he would not have delivered his opinion upon the construction of the settlement; and that upon the requisition of the trustees, he would direct the case to stand over, in order to make the personal representatives of the deceased infants parties.

July 17th.

The cause afterwards came on for re-argument, and was re-argued in the presence of the representatives of the two infants, on whose behalf Mr. *Wigram* and Mr. *Heberden* addressed the Court.

The defendant Robert John Mostyn consented, in the event of the Court deciding against the representatives of the infants, to a declaration that John Henry Mostyn took no interest in the fund, although he attained the age of twenty-one years.

The cases of *Whatford v. Moore* (a) and *Hubert v. Parsons* (b) were mentioned.

The VICE-CHANCELLOR said, that he adhered to the opinion before expressed by him as to the construction of the settlement; but if that opinion was erroneous, there was, he thought, but one other reasonably possible view of the instrument—a view which would equally exclude the children who died infants and without having been married during the joint lives of the two parents. As to the other deceased child's share, the parties were agreed.

(a) 3 Myl. & C. 270.

(b) 2 Vez. sen. 261.

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OLDFIELD v. COBBETT.

March 27th.

THE defendant, William Cobbett, who was sole residuary legatee and executor under his father's will, was in contempt for the non-payment of costs incurred on a motion made by him on the Equity side of the Court of Exchequer. An order to defend *in formâ pauperis* had been obtained by the defendant on the 4th February, 1840, but the order was not properly intitled in the cause.

A defendant, who defends as executor, and is in contempt, may be admitted to defend *in formâ pauperis* for the purpose of clearing his contempt.

A motion was now made on behalf of the defendant, that the order of the 4th February, 1840, and the petition upon which it was founded, might be amended, or that the defendant might be admitted to defend *in formâ pauperis*, and that he might have a counsel and solicitor assigned, to act on his behalf in this suit.

In opposition to the motion, the affidavit of the plaintiff was read, stating that the applicant was made a defendant to the suit solely in the character of executor of his father.

Mr. Temple and Mr. Addis, for the motion.

Mr. Simpkinson and Mr. Bacon, *contrà*, objected, that the defendant, being in contempt, could not be heard.

The VICE-CHANCELLOR.—A party in contempt can proceed for the limited purpose of clearing his contempt. The question is, whether the defendant shall be allowed to defend *in formâ pauperis* for that exclusive and limited purpose.

Mr. Bacon then argued that the defendant, being sued as an executor only, could not be permitted to defend *in formâ pauperis*; citing *Oldfield v. Cobbett (a)*.

(a) 3 Beav. 432.

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Mr. *Temple*.—In an old case of *Paradice v. Sheppard* (a), it was held, that an executor can not sue as plaintiff *in formâ pauperis*, because he need not have taken on himself the duty, and he sues *en autre droit*; but that case has been doubted. With regard to a defendant, however, the case is very different; for, having taken on himself the duty of an executor, he is not at liberty to retire; and if he has honestly paid away his testator's assets, and is himself poor, he could not defend at all unless he could do so *in formâ pauperis*: 11 Hen. 7, c. 12; *Lord Bacon's Orders* (98); *Beames's Orders*, 44; *Wallop v. Warburton* (b). In *Thompson v. Thompson* (c), the plaintiff, an executor, was allowed to sue *in formâ pauperis*, because he was also legatee; here, the defendant is sole legatee, as well as executor. It does not appear from the case of *Oldfield v. Cobbett*, as decided by the *Master of The Rolls*, that an order for an executor to defend *in formâ pauperis* might not be made on special application.

Mr. *Bacon*, in reply.

The VICE-CHANCELLOR.—The last argument on the part of the plaintiff, which has been limited to the question, whether it is competent to the defendant to make the present application for the sole purpose of clearing his contempt, not displaced the opinion which I have already intimated that to that extent assistance may be given. Upon liberal and considerate, but, I think, not unjust view of this notice of motion, I am of opinion, that, to that extent the defendant may be relieved upon it, without trenching upon what the *Master of the Rolls* decided in *Oldfield v. Cobbett* in 1841. I shall, therefore, now make the order that this defendant be at liberty to proceed *in formâ*

(a) 1 Dick, 136.

Prac. 42.

(b) 1 Turn. & V. 518; 1 Dan.

(c) 2 Cox, 411.

peris, for the single purpose of discharging or clearing the contempt under which he is in this cause, but not otherwise.

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 v.
 COBBETT.

WARREN v. POSTLETHWAITE.

March 28th,
 29th.

THIS was a motion on behalf of the plaintiff for leave to enter a memorandum of service under the 24th Order of August, 1841. The affidavit in support of the application stated that the deponent did *personally* serve the defendant with a true copy of an *office copy* of the bill, having carefully examined the said copy with the said office copy before serving the same.

Practice in relation to the service of a defendant with an office copy of the bill.

Mr. *James*, in support of the motion.

The VICE-CHANCELLOR observed that the affidavit appeared to be defective in omitting to shew that there had been service of a true copy of the *bill itself*, and also in omitting to state the place of service.

Mr. *James* submitted, upon the first point, that the Court would give credit to the acts of its own officer, and would assume that an office copy of the bill was a true copy; and if so, a true copy of the office copy would be a true copy of the bill. He added that the affidavit ought to shew how the copy of the bill was a true copy. He referred to *Legh v. Legh* (a), *Blew v. Martin* (b), and *Penfold v. Bouch* (c). Upon the second point, he observed that the order of August, 1841, took no notice of a place of service, and that in the affidavit in *Blew v. Martin* the place of service was not mentioned.

(a) 27 Leg. Obs. 140.

(b) 1 Hare, 150.

(c) 2 Hare, 157.

1844.

WARREN
v.
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THWAITE.

The VICE-CHANCELLOR.—Unless the *Lord Chancellor* should hold that it is unnecessary to shew where the place of service was, or that an affidavit which leaves it uncertain where such service was made is sufficient, I shall continue to hold that it is necessary that the affidavit should shew that the service was within the jurisdiction of the Court. With regard to the other point, my present impression is, that to shew that a true copy of an office copy of the bill has been served is not sufficient. What a defendant has a right to require under the terms of the order is, that he be served with a copy of the bill, and I am not sure, if he be not so served, that the whole of the subsequent proceedings may not be rendered void.

The VICE-CHANCELLOR, on the following day, said that he had communicated with the *Master of the Rolls* and the *Vice-Chancellor of England* upon the subject of the present application, and they agreed with him in the two following propositions :—1. The assertion, that a true copy of an office copy of the bill has been served, ought not, or generally ought not to be considered as an assertion, that a true copy of the bill has been served. 2. It is not universally or generally necessary, where a true copy of a bill is sworn to have been served, to state whether, by examination or any other means, the writing served has been ascertained to be a true copy, in order to induce the Court to act upon the supposition that it was a true copy.

1844.

MICKLETHWAITE v. ATKINSON.

MR. ROGERS moved that certain exceptions which had been taken to the answer of a defendant, who, being of unsound mind, had answered by his guardian, but against whom no commission of lunacy had issued, might be taken off the file for irregularity.

Mr. Montagu opposed the motion.

The following authorities were referred to: *Mitf. Pl.* 103, 115; 2 *Dan. Ch. Pr.*, pp. 302, 403; *Strudwick v. Par- giter* (a), *Leving v. Caverly* (b), *Gason v. Garnier* (c), *Attor- ney-General v. Waddington* (d), *Crawford v. Kernaghan* (e); see *Carew v. Johnston* (f).

THE VICE-CHANCELLOR.—The question in this case is, whether it is regular to except for insufficiency to the an- swer of a defendant of unsound mind answering by a guardian appointed in the manner usual in such cases, there not having been any commission of lunacy, and there not being therefore any committee of his person or estate.

I am not aware of the existence of any authority di- rectly on the point. In respect of principle and conveni- ence, the question may be open to various considerations, and reasonable arguments for and against the validity of the exceptions.

If the answer stands on the footing of an infant's an- swer, insufficiency must, I suppose, be out of the question. If admissions in it can be read and used against the de-

March 29th.
April 3rd.
A plaintiff can- not except for insufficiency to the answer of a defendant of unsound mind, against whom a commission of lunacy has not issued, answering by his guardian.

April 3rd.

(a) Bunb. 338.

(b) Pre. Ch. 229; 1 Eq. Ca. Abr. 281.

(c) 1 Dick. 286.

(d) 1 Madd. 321.

(e) 1 Dr. & Wal. 195.

(f) 2 Sch. & L. 293.

1844.
 MICKLE-
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 v.
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fendant, so as to affect his rights and interests, ought the Court, when his own conscience cannot be searched, nor his mind, memory, or volition be exerted, to lend its aid for the purpose of obtaining admissions, which, proceeding from another, are without the intervention or participation of his own conscience, will, or understanding, to bind him, however important the matter brought into contest may be? If the guardian will imprudently or falsely plead, will imprudently demur, or will prejudicially answer, there may possibly be no help for it, as between the plaintiff and defendant, at least the latter may have to abide all the consequences. As to that, I say nothing. The question before me is, whether, the defence being by answer, the Court is to compel the answer to be full. The case of *Barrett v. Tickell* (a) happening to occur to my recollection after the argument, I have referred to Mr. *Jacob's* report of it. Lord *Eldon* says there, that the plaintiff can have no discovery from Charles Tickell, "for in his state of mind he is unable to disclose anything. On the other hand, there is Joseph Tickell, who seems to have been employed by these persons to manage the business for them,"—and, a little lower, he speaks of circumstances that "cannot be established by the admission of the defendants." Now Charles Tickell had answered by Joseph, as his guardian, Charles having become lunatic, but no commission having been taken out; and Joseph was conducting, in the name of Charles, the action against the plaintiff in equity, which it was one object of the suit of *Barrett v. Tickell* to stay.

Mr. Berrey, a very experienced officer of the Court, has been so good, at my request, as to refer to the proceedings, and has shewn me the answers. The first answer of Charles Tickell and Joseph Tickell was joint, as was their second answer. Joseph Tickell, who, being a defendant

(a) Jac. 154.

in his own right, was or might have been interrogated, independently of his character of guardian, as to all the matters mentioned in the bill, may not improbably have had, at least, as full knowledge and as ample means of giving information as Charles, if sane, would have had. The documents were, as I collect, in Joseph's possession. He seems, so far as I have been able to form a judgment, to answer, both in his own right, and as Charles's guardian, every question that he answers at all, making no distinction between the two, unless as to the documents. Exceptions for insufficiency appear to have been taken to the first answer. Mr. Berrey infers, and I infer also, that, under the circumstances to which I have referred, these exceptions were in form applied to both defendants, who (the exceptions having been allowed or submitted to, as it is to be supposed) put in the further answer that I have mentioned.

Mr. Berrey (who thinks the present exceptions irregular) is not, nor am I, aware of any other instance of exceptions for insufficiency to the answer of a defendant of unsound mind, answering by guardian, there being no committee. The attention of the Court was not, as far as I am aware, drawn in *Barrett v. Tickell*, and I do not consider it as involving any judicial decision or judicial expression of opinion with reference to the point now before me. Supposing the exceptions in the present instance not to have been resisted, but to have been allowed, I am not prepared to say by what means, or whether by any, the guardian or the defendant himself could have been compelled to answer them; nor, if the answer had admitted documents to be in the possession of the guardian or of the defendant, do I at present see that an order for the production of them, if obtainable, would have been so nearly a matter of course as Mr. *Montagu* has suggested. Whether the answer of such a defendant so put in can or can not be read or used against the guardian, out of the suit, so

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THWAITE
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 MORTON
 NEW YORK
 R.
 JONATHAN

as to affect his own interests, or can or can not be ren-
 used against the defendant as to affect the defend-
 er's estate or rights in or out of the suit, I do not say; it be-
 I think, unnecessary for me to express any opinion. How-
 ever these questions may stand, I think it more consist-
 with principle, more safe, and more likely to be of gen-
 convenience, to hold that the exceptions cannot be in-
 tained, than to affirm the contrary proposition. In
 absence, therefore, of precedent or direct authority, I
 act upon that notion, and direct the exceptions to be
 off the file. The costs of the motion on each side to
 be costs in the cause.

I have reason to believe that I am not the only ju-
 of this Court, whose opinion it is, that a plaintiff can
 except, for insufficiency, to the answer of a defendant
 unsound mind, against whom a commission of lunacy
 not issued, answering by his guardian.

With reference to a doubt that I expressed some
 back as to a point of practice connected with such an
 swer, (and I think in this cause), there seems no suffi-
 ground for questioning the regularity of the proceedi-
 by means of which this answer has been put on the
 The plaintiff, if he had considered the defendant to
 capable of answering without a guardian, might have
 an application to the Court on the subject.

1844.

WESTOVER v. CHAPMAN.

March 23rd.

ANN ADAMS by her will gave the residue of her personal estate to her executors, upon trust that they should convert such part thereof as should not consist of money into money, and lay out and invest the same in their or his names or name, as soon as the same should be received by them, in the public stocks or funds, or on good private securities, and that they should alter and vary such stocks, funds, and securities, as they or he should see occasion, and should receive and take the dividends, interest, and annual produce thereof, as the same should become due, and pay the same unto her daughter Mary Ann, the wife of Thomas Westover, for and during the term of her natural life, for her sole and separate use exclusive of her husband &c., her receipts alone, notwithstanding her coverture, to be good discharges to her said executors for the same; and from and immediately after the decease of her said daughter, Mary Ann Westover, upon trust that they, her said executors, or the survivors, &c., should stand possessed of and interested in all and every the said residuum of her personal estate and trust monies, and of the stocks, funds, and securities, in or upon which the same should be then invested to and for the only use and benefit of all and every the children of her said daughter, Mary Ann Westover, lawfully begotten and to be begotten, in equal parts, shares, and proportions, and share and share alike, to be paid, assigned, and transferred to such children respectively, when and so soon as the youngest of them should attain the age of twenty-one years; and the dividends and interest thereof in the meantime to be paid and applied for their respective maintenance.

The testatrix died in August, 1827, leaving Mary Ann Westover surviving her. Mary Ann Westover had three children, daughters, all of whom attained twenty-one. The

Trustees under a will decreed to pay interest at £5 *per cent. per annum*, on balances mixed by them with their own monies, and used in their own business, although the will authorized them to invest the residue on "good private securities."

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 v.
 CHAPMAN.

executors, Chapman and Morgan, proved the will, and paid the debts of the testatrix, and received the residue to a considerable amount. The bill, which was filed against them by Mr. and Mrs. Westover, the three daughters, and the husbands of two of them who were married, alleged that they had misapplied the residue by mixing it with their own monies and making a profit of it; and the bill prayed that they might be charged with interest at the rate of *£5 per cent. per annum* upon the balances from time to time received by them.

In consequence of the death of Mrs. Westover, which took place in December, 1841, a bill of revivor and supplement was filed against the defendants by Thomas Westover, as the administrator of his wife, and by the before-mentioned plaintiffs.

It was admitted by the answers of the executors that the sum of *£900*, being the principal part of the residue of the testatrix's estate, was at her death in the hands of Henry Shepherd, who paid interest at that time at the rate of *4l. 10s. per cent.*, and afterwards at the rate of *£4 per cent.* for the same; that, in the following December, Shepherd paid the executors *£100* on account of the debt, and that on the 6th July, 1832, he paid them the remaining *£800*; that they then took that sum into their own keeping in equal moieties, giving each other their cross promissory notes for *£400* a-piece, and paying Mrs. Westover interest at *£4 per cent. per annum* on the amount. They further admitted that they mixed this money with their own, and employed it in their own respective businesses of farmers and graziers, and they believed they made some profit of it, but not beyond *£4 per cent. per annum*.

In justification of the course which they had pursued, the executors stated that the *£800* had been left in the hands of Shepherd in the first instance, and then in their own hands, in order that Mrs. Westover might be accommodated with *£4 per cent.* interest, which could not otherwise be ob—

tained, and also that the children might not be prejudiced by any fall in the funds, which might occur in case the money were invested on that security. And the executors alleged that Mrs. Westover's children both knew and acquiesced in the whole of these arrangements until the year 1841, when their solicitor wrote to the executors, calling them to account.

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It appeared from the evidence on the part of the plaintiffs, that in September, 1836, an application was made by one of the children, Maria Westover, afterwards Mrs. Carder, for some information respecting the trust fund, and for an advance of part of her share; and that in March, 1838, shortly previous to her marriage, a similar application was made by her solicitor; and that these applications were answered, in the first instance, by a letter of the defendant Morgan, containing these words:—"You can have nothing to do with the money till after the demise of your mother; and Mr. Chapman and myself by your grandmother's will are bound to pay the surviving children six months after her death. The money is out on good security, and your mother receives the interest regularly every half year;" and in the latter instance by a letter of both executors containing these words: "The property due to the children of Mrs. Westover at her demise is £800, upon *undeniable security of men of large landed property; the same as at the death of Mr. Adams.* What Mrs. Carder or the other daughters of Mrs. Westover like to do as to the disposal of the property, we, as executors, have nothing to do with. At Mrs. Westover's death the money will be paid to them, the same regular way as the interest has been." It further appeared that the sum of £50 on account of Mrs. Carder's share in the residue was afterwards advanced by Chapman to John Carder, the husband of Mrs. Carder, on the security of his bond, dated the 24th April, 1838, which bond, though it mentioned the amount of residue to

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be £800, was silent as to the particular manner in which the residue was invested.

It further appeared from the evidence, that in February, 1841, upon the executors advancing to Harriet Westover (who was living with her father and mother) £50 in part payment of her share of the residue, they took from the father and mother and Harriet a deed of release for that sum, dated the 27th February, 1841, by which it was amongst other things recited, that, upon the death of the testatrix, the executors possessed themselves of her effects, paid her just debts and testamentary and funeral expenses and legacies, and “invested the clear residue of her personal estate in their names upon *good private security* agreeably to the directions for that purpose in the said will contained.”

It appeared from the answers of the defendants, and otherwise, that the plaintiffs were in an humble situation of life.

The cause now came on for hearing for further directions.

Mr. *Wigram* and Mr. *Hore*, for the plaintiffs, said, that the words of the will did not warrant the executors in placing out the money on their own personal security; and that, as they had used it for their own purposes, they must account for the profits made by it, or pay *£5 per cent.* interest.

Mr. *Russell* and Mr. *Bilton*, *contrà*, contended, that one of the plaintiffs at least, namely, Mrs. Westover, had not been justified in filing the bill, nor had there been any calling in of money by the executors. The money having been paid to them, they had endeavoured to act for the benefit of the plaintiffs.

Mr. *Bilton* also appeared separately for the defendant Chapman.

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The VICE-CHANCELLOR said that there was no evidence that any one of the plaintiffs, who were in an humble station, ever was aware of the true position of this money. There were suggestions in the answer tending to shew that they had some knowledge on the subject; but, looking at the letters of 1836 and 1838, looking at the bond of 1838 and the release of 1841, he was obliged to come to the conclusion (or rather, he thought, these documents formed an additional reason for coming to the conclusion) that they had not that knowledge. Whether the plaintiffs were or were not capable of understanding the nature of their interests or the propriety of the investment of the money, he thought it clear that proper information on the subject had not been conveyed to them. Under the circumstances, the defendants had so dealt with the fund as to make it a plain case for fixing them with the payment of interest at *£5 per cent.*

With respect to the costs of the suit, a question was raised, whether the defendants ought to pay the costs of an inquiry which the Master had been directed to make as to the number of Mrs. Westover's children and their ages, &c.

Trustees decreed to pay the costs of an unnecessary inquiry directed before the Master, as to the state of the testator's family.

In the answers of the defendants to the bill of revivor and supplement, they admitted that the plaintiffs, in the original bill mentioned, were (that is at the time of putting in the answer) the only children of the late plaintiff, Mary Ann Westover, and that they had attained the age of twenty-one.

Notwithstanding this admission, the defendants, on the original hearing of the cause, insisted that a reference should be directed to the Master for the purpose above stated.

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WESTOVER
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Notwithstanding this admission, the defendants, on the original hearing of the cause, insisted that a reference should be directed to the Master for the purpose above stated.

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 v.
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The Master reported that Mrs. Westover had had four children only, namely, the three plaintiffs, and a son who died in April, 1813, at the age of eight weeks.

At the present hearing the before-mentioned bond and release were read in evidence.

In the bond of April, 1838, (which was given to Chapman only), it was recited that Mrs. Westover had three children, that they had attained twenty-one, and upon her death would be entitled to the sum of £800, the amount of the residue, in equal shares, and that John Carder and Maria his wife having applied for an advance of £50, the defendant Chapman had agreed to advance that sum on the security of the share of Maria Carder.

In the release of February, 1841, it was recited that Mary Ann Westover had then three children only, and that it was not probable, from her advanced age, that she would have any more, and that Harriet Westover, having attained twenty-one, had applied for an advance of £50, &c.

The VICE-CHANCELLOR, after noticing the fulness of the recitals of the deed of release of February, 1841 (*a*), said that that deed must be taken to amount to an admission by the defendants that the fund to which it related was a clear fund. He must, therefore, view the defendants as trustees rather than executors. Still they had a right, as trustees and executors, to know the state of the family. Now it was not technically expressed either in the release or the bond, more than in the answers, that there had never been any other child of Mrs. Westover who had attained a vested interest in the fund; but looking at the substance of the case without critical nicety, it was plain to him that, when these instruments were executed, the executors had satisfied themselves that three, and three only, of the children were entitled to participate in the

(*a*) See ante, p. 180.

fund; and although at the former hearing, when dealing with the answers only, he had thought it right, upon the requisition of the executors, to direct the reference, yet upon the whole of the materials which were now before him, he was of opinion that the executors ought not to have asked for the inquiry. They must, therefore, pay the costs of it.

His Honor then mentioned that there were some costs (*see the decree*), unnecessarily caused by the plaintiffs, which must be set off against these costs.

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CHAPMAN.

DECLARE that the plaintiffs are entitled to interest at the rate of £5 *per cent. per annum* on the sum of 796*l.* 9*s.* 5*d.* (a), mentioned by the defendants in their answers in these causes, from the 6th day of July, 1832, to the 24th day of April, 1838, on the sum of 746*l.* 9*s.* 5*d.*, part of the said sum of 796*l.* 9*s.* 5*d.*, from the said 24th day of April, 1838, to the 27th day of February, 1841, and on the sum of 696*l.* 9*s.* 5*d.*, part of the said sum of 796*l.* 9*s.* 5*d.*, from the said 27th day of February, 1841, to the 5th day of July, 1842, but that the defendants are entitled to be allowed, in reduction of such claims in respect of interest, the amount of all payments made by them or either of them in respect of interest since the said 6th day of July, 1832. Refer it to the Master (in case the parties differ) to ascertain the amount of interest on the said three sums, having regard to the aforesaid declarations. Let the defendants William Chapman and Giles Chapman Morgan, on or before, &c., pay into Court what the Master shall certify to be due to the plaintiffs in respect of such interest or the amount which the plaintiffs and defendants shall agree upon as being due to the plaintiffs in respect of interest as aforesaid, (such amount in that case to be verified by affidavit). Upon such payment being made, let the defendants deliver to the plaintiffs the bond and indenture of release, dated respectively the 24th April, 1838, and the 27th February, 1841, in the pleadings mentioned. Refer it to the taxing Master to tax the plaintiffs' costs of these suits, except so far as such costs have been increased by the plaintiffs' bill in the first mentioned cause seeking a general account of the estate of Mary Ann Westover, instead of being confined to seeking payment of the sum of 696*l.* 9*s.* 5*d.*, and the relief relating thereto. And let the taxing Master tax, as between solicitor and client, so much of the defendant Giles Chapman Morgan's costs of these suits as have been occasioned by the plaintiffs' said bill in the said first mentioned cause, seeking a general account, instead of payment of the said sum of 696*l.* 9*s.* 5*d.* as aforesaid. Let such several costs be set off

(a) The sum of £800 was reduced by a small payment made by one of the executors.

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WESTOVER
v.
CHAPMAN.

one against the other, and let the balance of such costs, the amount to be certified by the taxing Master, be paid by the defendant Giles Chapman Morgan to the plaintiffs in the second-mentioned cause, or by them the said plaintiffs to the said defendant Giles Chapman Morgan, as the case may be. Liberty to apply.

April 23rd.

LYSE v. KINGDON.

Executors of trustees decreed to pay the costs of a suit rendered necessary by their having refused to pay over the trust fund on reasonable evidence of a person's death: but inasmuch as the trustees had been guilty of a breach of trust in relation of the fund, such costs were decreed to be paid out of the assets of the trustees, and not personally by the executors.

ELIZABETH WALKER, by her will, bequeathed all the residue of her personal estate to her sisters Sarah Clapton and Ann Lyse, in trust for themselves and their brothers John Lyse and Tellno Lyse, in equal proportions; but in case any of the said legatees should die in the lifetime of the testatrix, leaving any child or children, the share of the legatee so dying was to go to his or her child or children.

The testatrix died in February, 1818, and her will was duly proved by the two executrices.

Tellno Lyse, one of the legatees named in the will, lived at Ripple, in the county of Worcester, and died in 1814, (in the lifetime of the testatrix), leaving a son William, the plaintiff in this suit. He had also a son named James, who left Ripple in 1793, and was supposed to have gone to sea. His father declared many times before his death that he had never heard of him since he left Ripple.

In September, 1826, the executrices under the will met by appointment the several legatees, and an account was then settled and signed by all parties, except James Lyse; and the residuary estate, being divided into four parts, was distributed amongst the parties, except that the share to which Tellno Lyse would have been entitled, if living, was divided in moieties, one moiety being paid to the plaintiff, and the other moiety being retained by the executrices, who signed a memorandum, dated the 9th September,

1826, to the effect that they retained that moiety, amounting to 1559*l.* 4*s.* 4*d.*, for the use of James Lyse, late of Ripple, in the county of Worcester, labourer, son of Tellno Lyse, deceased, &c.

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The executrixes died respectively in 1831 and 1835, without ever having invested the share of James Lyse in the funds or other security.

In November, 1837, the present bill was filed by the plaintiff against the executors of the two executrixes for the purpose of recovering the share so retained.

The defendants, the executors of Ann Lyse, by their answer admitted that, several months before the filing of the bill, namely, in January, 1837, the plaintiff furnished them with a written declaration (under the statute) of William Devereux, of Tewkesbury, labourer, who stated that he was well acquainted with James Lyse, who, together with the deponent and one Vaughan, lived about forty-five years since in the service of Berkley, a farmer, at Ripple; that Vaughan and James Lyse left their service, and went, as the deponent believed, to London; that the deponent had ever since lived within four miles, and the greater part of the time within two miles, of Ripple, and had never heard of James Lyse since, except that, about the Christmas after he left Ripple, the deponent heard that he had gone to sea.

The same executors also admitted the receipt of a letter to them from the plaintiff's solicitors, dated the 6th July, 1837, in which the writers, after stating that they had advertised for information on the subject, proceeded in these terms:—"The advertisement brought forward the information required from a person connected with this country, and who now holds an office under government in London, and was formerly in the Royal Navy. This gentleman has volunteered to make an affidavit of the following facts amongst others,—that he was a prisoner at Valenciennes in 1814,

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and previous thereto, that, whilst he was there, a prisoner was brought in whose name was James Lyse, and he said he was a native of the county of Worcester, and our informant told him he was a native of the city of Worcester. From this circumstance an intimacy arose between them. Among other things he told our informant that he left his place of service at Ripple in Worcestershire, and went to London and worked in the London Docks; that he was afterwards pressed into the navy, from which he deserted, and then entered the merchant service, and belonged to the brig Mary, from Cork for London, Captain Hancock; that the said James Lyse died at Valenciennes on or about the 13th January, 1814; that he saw him after he was dead, and was at his funeral; that he was interred within the walls of the citadel; that in all the communications and conversations he had with the said James Lyse he never named that he had either a wife or family."

In answer to this letter, the solicitor of the same executors replied, that the plaintiff's solicitors ought to have given him the name and address of the gentleman alluded to, which probably they would do; in which case, he the writer would, after communicating with the gentleman, provided the facts appeared to him in the same light &c., advise his clients, if the plaintiff's solicitors wished it, to take further advice of counsel, &c. He added that there did not appear to be any possibility of shewing the identity of the person said to have died in 1814 with James Lyse.

The course taken by the executors of Sarah Clapton will sufficiently appear from the judgment.

The bill was filed without any further preliminary proceedings between the parties.

The witness mentioned in the letter of the plaintiff's solicitors was examined before the Master. It appeared that he had been private secretary of Lord Barrington, who was

one of the commissioners acting on behalf of the prisoners confined at Valenciennes. His evidence fully bore out the statement contained in the letter of the plaintiff's solicitors; and he mentioned additional circumstances tending to shew the identity of the person, whom he knew, with James Lyse.

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Upon the original hearing of this cause it had been referred to the Master to inquire whether any and what child or children of Tellno Lyse other than the plaintiff was or were living at the death of Tellno Lyse or of the testatrix; and subject to that inquiry it had been declared that the estates of the executrixes were indebted to the plaintiff in the sum claimed, with interest from the 9th September, 1826. The Master having found that no other child of Tellno Lyse than the plaintiff had survived him or the testatrix, and the defendants having admitted assets (between them) of the executrixes for payment of the whole debt, the only question, on the hearing of the cause for further directions, was, by whom the costs of the suit were to be paid.

Mr. Russell and *Mr. Campbell*, for the plaintiff.

Mr. Simpkinson and *Mr. Osborne*, for the executors of Ann Lyse.

Mr. Swanston and *Mr. Heathfield*, for the executors of Sarah Clapton.

THE VICE-CHANCELLOR.—The testatrix Elizabeth Walker died in 1818. Her will was proved in the same year by her two sisters, who were her executrixes, Sarah Clapton and Ann Lyse. The assets received were considerable, and left a clear residue. That residue, subject to what I am about to state as to one share, was divided by the executrixes amongst the persons entitled to it under the will.

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One share of the residue, however, was thus circumstanced: If James Lyse, a nephew of the testatrix and her sisters, was alive at the time of the decease of the testatrix, this share belonged to him; but if he did not survive her, that share belonged to the plaintiff, who was also a nephew of these three women. In fact, James Lyse did not survive the testatrix, so that this share belonged originally, has always belonged, to the plaintiff. There never was at any time reason to suppose that James Lyse had not died (as he did) in the lifetime of the testatrix; there were strong reasons to suppose the contrary. After administering the estate for seven or eight years, the two executrixes set apart a sum which they stated, and probably with accuracy, to be the amount of this share, and signed a paper acknowledging that they retained that sum in respect of such share. That occurred in September, 1826. It was the duty of the two executrixes at that time to set apart and to invest that share in some proper manner; either on mortgage, or in the funds. They did neither the one nor the other; they neither invested it nor appropriated it. It remained merely a simple contract debt from them, liable to the contingency of their insolvency, and all other like contingencies. Sarah Clapton died in 1831, and Ann Lyse in 1835. At least as early as the year 1826 or 1827, they committed a breach of trust as to this share, and it is clear that, at the death of each, each was indebted to the extent of the whole of this sum; it was a debt contracted by means of a breach of trust.

After the death of the survivor of the two executrixes, if not sooner, applications were made by the plaintiff, whose money it always was, for payment. Applications of this nature are proved to have been made to the executors of Ann Lyse, though not, as I collect, to the executors of Sarah Clapton. These applications were met by the assertion that the money was not his; at all events, that further proof of the time of James Lyse's death was necessary. Further—

information was given, but without effect, and the result was, that this bill was filed in November, 1837. The representatives of Sarah Clapton were not made parties until 1839.

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The representatives of Sarah Clapton in their answer enter into long statements; they say that they have divided the estate of their testatrix, without saying whether, in fact, the debts of their testatrix were paid, and after alleging, that, by the plaintiff's own shewing, James Lyse has been dead upwards of 20 years, they submit that the plaintiff's demand is barred by the statute of King James the First, and they claim the benefit of the statute. It is clear from this answer, that, if any application for payment had been made to the representatives of Sarah Clapton, that application would not have been attended to. The suit is altogether resisted in a manner shewing that any such application would have been fruitless. Then how does it stand? Some circumstantial evidence was given at the former hearing to shew that James Lyse died in the lifetime of the testatrix; but as the defendants still disputed the fact, I was of opinion that they had a right to an inquiry, a right to full protection under the decree, and that it was proper that the usual advertisements should be published. The advertisements were issued, and the Master's report is, conformably to the previous evidence, that James Lyse died, in fact, more than three years before the testatrix.

Under these circumstances, the question being not whether I am to visit the defendants personally with the costs, but whether the costs of the suit should be allowed out of the estates of the two indebted persons, I have no doubt upon the subject. The two executrixes were unmarried and were indebted under a breach of trust. Was there, at any moment, any reasonable doubt of James Lyse's death having happened in the testatrix's lifetime? I am of opinion that there was not; and that this is a case in

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which the costs of the suit must be paid out of the assets of Sarah Clapton and Ann Lyse, and not personally by the defendants; but on account of the limited admission of assets on the part of the executors of Ann Lyse their liability must not be extended beyond that limit.

DECREE for payment of the amount claimed, against the defendants, with costs of suit. The decree not to be executed against the executors of Ann Lyse beyond the amount of £——, being the amount of assets admitted by them for payment of the debt. Let the executors pay their own costs.



April 16/h.

PALSGRAVE v. ATKINSON.

Conditions annexed to appointments made in pursuance of a power, though in themselves void, held not to invalidate the appointments.

BY the marriage settlement of Theodore Palsgrave, Esq., with Charlotte Law, it was declared that a sum of £2000 *£3 per cent.* Consols should be held by certain trustees upon trust to pay the dividends and interest to the husband and wife for their lives, and after the decease of the survivor of them, upon trust to transfer the principal unto and amongst all and every the sons and daughters of the marriage and their children, in case any of them should be then dead leaving issue, in such parts and proportions, and at such time and times, and in such manner as Theodore Palsgrave should by will, executed as therein mentioned, appoint, and, in default of appointment, unto and amongst all and every the said sons, daughters, and children equally; with power to the trustees, upon the request of the husband and wife, or the survivor of them, to sell out the stock and invest the produce in the purchase of such freehold lands, tenements, and hereditaments as the husband and wife should by writing appoint, to be held upon the trusts of the settlement.

The marriage took effect, and, in 1825, the stock ~~was~~ sold out. The produce, together with an additional sum

advanced for that purpose by the husband, was by the written direction of the husband and wife invested in the purchase of a leasehold house in Mecklenburgh Square; and, by the consent of the three only children of the marriage, a memorandum was endorsed on the settlement to the effect that the leasehold house was held upon the trusts of the settlement.

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Theodore Palsgrave, having survived his wife and one of his children, appointed by his will the house in Mecklenburgh Square to his two sons, John Henry Palsgrave and Charles Theodore Palsgrave, in the proportions of nineteen-twentieths and one-twentieth, and he thereby declared his wish and request to his son John Henry, that *he should not sell or dispose of his interest in the said house* to any person whomsoever; and the testator gave the residue of his estate to his two sons equally.

By a codicil dated the 14th May, 1839, reciting the bequest in the will of the house in Mecklenburgh Square, and also that the testator had given up to Charles Theodore Palsgrave a sum of £1500 sterling due from him to the testator, and all interest thereon, the testator declared that, in case his said son Charles Theodore Palsgrave should marry in his lifetime, then he revoked so much of his will as related to the two bequests and to the delivering up to him of his said note, and instead thereof he gave his son John Henry Palsgrave the said £1500 and interest thereon, and the note upon which the same was secured, and also 1-500th part of the said house; and to Charles T. Palsgrave the remaining 499-500th parts, upon this condition, that *he should make a strict settlement of the same* upon any wife with whom he might intermarry, and upon the children who might be born of such marriage; and in all other respects he confirmed his will.

Charles Theodore Palsgrave, in the lifetime of his father, married Anna Maria Griffin, of Montreal, in Lower Canada. By the settlement, made previously to their marriage,

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dated the 24th August, 1839, and duly executed according to the laws of Canada, and to which the intended husband and wife (who was of age) were parties, after reciting that Theodore Palsgrave had expressed his intention to vest in the hands of trustees certain real estate situate in that part of the United Kingdom of Great Britain and Ireland called London, or the revenue and clear rents, issues, and profits thereof, to be enjoyed by Anna Maria Griffin from and after the decease of the said Theodore Palsgrave, as and for a marriage settlement upon and in favour of the said Anna Maria Griffin and the children and issue of the said intended marriage, it was agreed and stipulated by and between the parties thereto that the said Anna Maria Griffin should, during her natural life, have the full and perfect use and enjoyment of the said revenue arising from or out of the said rents, issues, and profits of the said real estate, or of any dividends or interests accruing from the same, or from the amount of the future disposal or sale of the same, subject nevertheless to the express condition that the said rents, issues, and profits, dividends and interest, should be applied to and for the support and maintenance of the said Charles Theodore Palsgrave and Anna Maria Griffin, and of their domestic establishment, during the natural life of the said C. T. Palsgrave, and after his decease in such manner as the said Anna Maria Griffin during her natural life might think proper; and further, that the said real estate or the capital thereof, upon the said future disposal or sale of the same, should belong to and be the property of the said children of the marriage, subject however to the free disposition of the same, to all or any of the said children, as he might think proper, by the said C. T. Palsgrave by last will and testament, and, failing such children, subject to the free disposition of the said real estate or capital as aforesaid by the said C. T. Palsgrave by last will and testament to any person or persons whomsoever: subject however to the disposal of the said A. M. Griffin during

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her natural life of the said revenue, rents, issues, and profits, dividends, or interests of the said real estate as aforesaid. And, after reciting that it might thereafter be deemed more advantageous for the purposes aforesaid that the trust aforesaid in the said real estate held by the said trustees should be sold, and the amount thereof be transferred to the said province of Lower Canada for the purpose aforesaid, it was stipulated by the said C. T. Palsgrave and A. M. Griffin that the said trustees should transfer their trust in the said real estate and the said revenue, rents, issues, and profits, dividends, or interests thereof to trustees or to a trustee resident in the said province of Lower Canada, to be named and appointed by the said C. T. Palsgrave and A. M. Griffin for the intents and purposes aforesaid; and upon such nomination and appointment being fully notified to the said original trustees, they should, within two months thereafter, duly transfer their interests aforesaid to the trustees or trustee so named and appointed; and thereupon all and every the responsibility in respect thereof of the said original trustees should cease and determine. And it was also further stipulated that the said revenue, rents, issues, and profits, or the said dividends and interest aforesaid during the natural life of the said C. T. Palsgrave should not nor be deemed to be in the nature of *propres* against the estate of the said C. T. Palsgrave, and that in consideration of the said intended marriage and the exclusion of community of property the said revenues, rents, issues, and profits, and the said dividends and interest during the natural life of the said A. M. Griffin, in case she should survive the said C. T. Palsgrave, should be in lieu of dower and of every other matrimonial right, claim, pretension, or demand whatsoever.

Theodore Palsgrave had no real estate in London except the leasehold house in Mecklenburgh Square.

By an indenture dated the 23rd September, 1842, John

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Henry Palsgrave released all his interest in the house to Atkinson and Gosling, the trustees of his father's settlement, in order to enable them to sell, assign, or otherwise dispose of, the entirety of the said messuage, and apply the whole of the proceeds arising from the sale in such manner and for such purposes as the said Charles Theodore Palsgrave or the trustees under his marriage settlement might direct.

There was no issue of the marriage of Charles Theodore Palsgrave.

No trustees of Charles Theodore Palsgrave's marriage settlement had been appointed.

The original bill was filed by Charles Theodore Palsgrave and Anna Maria his wife, against Atkinson and Gosling, praying for a sale of the house, and that the proceeds might be transferred to trustees resident in Lower Canada to be named and appointed by the plaintiffs upon the trusts of the plaintiffs' marriage settlement.

The bill was afterwards amended by making the husband a defendant instead of a plaintiff.

The cause now came on for hearing for further directions on the Master's report. The Master found, that, according to the law of Lower Canada, the defendant Charles Theodore Palsgrave had, at the date of the report, an absolute vested interest in the leasehold messuage in Mecklenburgh Square; that the plaintiff Anna Maria Palsgrave had a beneficial interest in the said property and a lien upon the whole estate of the defendant Charles Theodore Palsgrave for the fulfilment of the stipulations of the settlement in her favour; that both parties, according to the laws of Lower Canada, were entitled to require the sale and transfer of the property for the purposes of the settlement, and that there being no issue of the marriage, and both parties being mutually agreed as to the disposition of the property, the same was, according to the laws of Lower Canada, saleable in such manner as they might think proper and advisable.

The question was, whether the provisions either of the will or codicil could have the effect of invalidating the sale.

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Mr. *Wigram* and Mr. *Collins*, for the plaintiff.—The conditions annexed to the appointments in the will and codicil are void, but the rest of the appointments are good. In *Alexander v. Alexander* (a), Lord *Hardwicke* said—"Suppose a power to a man to appoint £1000 among his children; if he gives the whole £1000 to his children and annexes a condition that they shall release a debt owing to them or pay money over, the appointment of £1000 would be absolute and the condition only void." So again in *Burleigh v. Pearson* (b)—"Not that I say the Court might not hold the execution good and the condition void; but to what purpose, when it would be contrary to the intent of the power?" And upon these principles *Sadler v. Pratt* (c) was decided. So here the conditions of not selling the estate and of making a strict settlement will not be considered to affect the validity of the appointments, which are absolute to the two sons. The settlement, however, itself recognizes and confirms the right to sell the property.

Mr. *Heigham* appeared for the defendants.

The VICE-CHANCELLOR.—Saving whole the right, if any, of the eldest son, I think I may declare the property saleable.

DECLARE that under the codicil and the settlement of August, 1839, and the deed executed by John Henry Palsgrave, the house is saleable, subject to the provisions contained in the settlement. * * * * The decree to be without prejudice to the exercise of any power of appointing trustees of the settlement.

(a) 2 Vez. sen. 644.

(b) 1 Vez. sen. 282.

(c) 5 Sim. 632.


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NICHOLSON v. HAINES.

An affidavit is not receivable in evidence on further directions.

ON the hearing of this cause for further directions, Mr. *Bacon* tendered an affidavit in support of a fact not included in the finding of the Master.

The VICE-CHANCELLOR said that he could not receive an affidavit on further directions; but he thought that this was a matter as to which a general order of the Court might be useful.



MEMORANDA.

ON Easter Sunday, the 7th April, 1844, Lord *Abinger*, Lord Chief Baron of Her Majesty's Exchequer, died, while on the circuit, at Bury St. Edmonds. He was succeeded in his office by Sir *Frederick Pollock*, Her Majesty's Attorney-General.

Sir *William Webb Follett*, Her Majesty's Solicitor-General, was appointed Attorney-General.

Frederick Thesiger, Esq., of the Inner Temple, one of Her Majesty's counsel, was appointed Solicitor-General, and shortly afterwards received the honour of knighthood.

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MULLEN v. BOWMAN.

May 3rd.

JOHN BOWMAN, of Carlisle, made his will in these words:—" I bequeath all my goods, chattels, and personal estate, (my leasehold houses and premises excepted), unto my cousin John Bowman, and my sisters Dinah Bowman and Ann Bowman, upon trust, that they convert the same into money, and apply the net proceeds thereof towards payment of my debts and funeral and testamentary expenses; but my wearing apparel to be given away to whom they may think fit. And I give, devise, and bequeath unto them, the said John Bowman, Dinah Bowman, and Ann Bowman, all my freehold, leasehold, and other houses, buildings, and premises, situate in the city of Carlisle aforesaid, or elsewhere; to hold to them, their heirs, executors, administrators, and assigns, for all my estates, terms, and interests therein respectively, nevertheless upon the trusts hereinafter declared concerning the same, that is to say, in trust, that, during the lives of my sisters Margaret Stephenson, Elizabeth Mullen, widow, and Mary Mattinson, and the life of the longest liver of them, and also during the lives of their respective husbands, they the said John Bowman, Dinah Bowman, and Ann Bowman, and their heirs, executors, or administrators, do and shall, by and out of the annual rents, issues, and profits thereof, pay off and satisfy all my just debts and funeral and testamentary expenses, and maintain and support my said sisters Margaret, Elizabeth, and Mary, and each of them, and the respective husbands of the said Margaret and Mary, and also my nephew Thomas, son of my late bro-

Testator, by his will, which was not affected by the stat. 11 Geo. 4 & 1 Will. 4, c. 40, gave all his personal estate (his leasehold house and premises excepted) unto his cousin and two sisters, by name, upon trust to convert the same into money, and apply the proceeds towards payment of his debts and funeral and testamentary expenses; but his wearing apparel was to be given away to whom they might think fit. He then gave his freehold and leasehold premises to the same persons, upon trust to sell and divide the proceeds among certain persons, two of whom were the trustees; with a declaration that, in order to facilitate such sale, the receipts of his said trustees should be sufficient discharges. He

then, after appointing his said trustees to be his executors, declared, that his said executors and trustees might retain to and reimburse themselves all their costs, charges, damages, and expenses occasioned by the due execution of the trusts thereby in them reposed:—*Held*, that the executors did not take beneficially the residue of the personal estate which remained undisposed of after payment of the testator's debts, and funeral and testamentary expenses.

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ther Robert Bowman, and who is now a minor, and my said sisters Dinah and Ann, in such manner and proportions as they the said trustees shall in their discretion think fit; such provision for my said sisters Margaret, Elizabeth, and Mary, to be for their separate uses, and not subject to any debts or control of their respective husbands. And from and after the decease of my said sister Margaret, Elizabeth, and Mary, and the respective husbands of the said Elizabeth and Mary, and the longest liver of them, upon trust, that they the said John Bowman, Dinah Bowman, and Ann Bowman, or their heirs, executors, or administrators, do and shall absolutely sell and dispose of all my said freehold and leasehold houses and buildings and other premises, together or in parcels, and either by a public or private sale or sales, for the most money that can be had for the same, and out of the monies arising by such sale or sales, do and shall in the first place, after paying off my just debts, if any be then remaining unpaid, defray all charges and expenses attending the same sale or sales, and apply the net residue and overplus of the said monies as follows: namely, to my sons and nephews Edward Bowman and Thomas Bowman, the sum of £50 each, and to my nephew Nicholas Bowman £20 and the then residue to be divided into five equal shares, one of which shares to be paid and divided equally amongst the children of my said sister Margaret; one other of such shares to be paid to the children of my said sister Elizabeth Mullen in like manner; one other share equally amongst the children of my said sister Mary, and the remaining two shares equally between my said sisters Dinah and Ann. And in order to facilitate such sale or sales I do hereby declare, that the receipt or receipts of my said trustees, or their heirs, executors, or administrators, under their hands, shall be good and sufficient discharges to the purchaser or purchasers, for all such monies as shall therein acknowledged or expressed to be received, and

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who shall be thereby acquitted and discharged of and from the same monies, and not bound to see to the application, or be answerable or accountable for the loss, misapplication, or non-application of the said purchase or consideration monies, or any part thereof. And I do hereby nominate, constitute, and appoint the said John Bowman, and my said sisters Dinah and Ann Bowman, executors of this my will. And I declare, that my said executors and trustees shall not be answerable one for another, and by no means for involuntary losses; and that they shall be allowed and may retain to and reimburse themselves all their costs, charges, damages, and expenses which shall or may, from time to time, arise or be occasioned by the due execution of the trusts hereby in them reposed. And I hereby revoke all former wills at any time heretofore made."

The testator died in November, 1824, and his will was proved by his executor and executrixes.

John Bowman, the executor, died in 1830, leaving Robert Bell his executor.

At the time of his death, the testator was entitled under the will of an uncle to a contingent reversionary share in the monies to arise from the sale of certain real estates, which were thereby devised to be sold after the death of three persons, in case one of them should die without leaving a child. He was also entitled to a like reversionary share in the monies to arise from the sale of other estates, which were by the same will devised to be sold, in the event of another person dying without leaving a child. These contingent interests constituted the clear residue of the personal estate of the testator at the time of his death, exclusive of his leasehold estate and wearing apparel.

In June, 1843, the contingency upon which the first-mentioned estates were to be sold having occurred, they were sold by auction; and by a decree of this Court it was ordered, that £1719, being that share of the produce to

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which the testator was entitled, should be paid to Dinah Bowman and Ann Bowman, as his surviving personal representatives.

The present bill was filed by the next of kin of the testator, John Bowman, other than Dinah and Ann Bowman against those persons and Robert Bell, for the purpose having the £1719 distributed amongst the next of kin of the testator, as part of the undisposed-of residue of his personal estate.

To this bill, the defendants Dinah and Ann Bowman demurred for want of equity.

Mr. *Bacon* and Mr. *W. D. Lewis*, for the demurrer — In *Pratt v. Sladden* (b) certain persons who were nominated trustees with reference to certain specific trusts, being also appointed executors, were held by Sir *William Grant* to be entitled to the residue undisposed of, it being considered, that there was no clear intention to make the trustees of the residue. The case of *Dawson v. Clark* which was similar in its circumstances, was decided by *William Grant* in the same manner; his Honor considered the right of the executors the same as that of residuary legatees. Upon appeal to Lord *Eldon*, his Lordship, in affirming the decree, proceeded upon different grounds (d). *William Grant*, however, in *Southouse v. Bate* (e) expressed his adherence to his original opinion. Here, the appointment of the executors as trustees of the residue is only for the payment of debts, a trust which they would have to perform, if they had been simply nominated executors. The other trust property is carefully kept apart from the residue which is the subject of this suit. Will an appointment in such terms exclude the executors from taking the unexhausted residue, as in the ordinary case of executors?

(a) The arguments are abridged
 from Mr. Bone's note.
 (b) 14 Ves. 193.

(c) 15 Ves. 409.
 (d) 18 Ves. 247.
 (e) 2 Ves. & B. 398.

The right is clear and indisputable at law, and was, until the statute (a), equally so in equity, unless the will itself negatived the presumption which arises in the executor's favour. Here, the executors were relatives of the testator. The receipt and reimbursement clauses, which are common forms, refer only to the trusts of the real estate.—They referred also to *King v. Denison* (b) and *Robinson v. Taylor* (c). [The *Vice-Chancellor* referred to *Langham v. Sanford* (d)].

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Mr. *Russell* and Mr. *Speed*, for the bill.—A trusteeship is fixed upon the executors through the whole will. The testator begins his will by giving his whole personal property, except his leaseholds, to his executors “upon trust that they convert the same into money.” When that trust has been performed, then arises the executors’ duty of paying the debts. It is said, however, that the whole of this trust might be performed by the executors in that character; and, consequently, that their appointment as trustees is mere surplusage. But can it be doubted, that, if other persons had been appointed executors, there would still have been trustees? That the testator intended a trust of the residue, and not a gift of it to the executors, is evident from his direction as to his wearing apparel. For if, as is contended, they were to take the whole residue, it was unnecessary to empower them to deal with the apparel as they might think fit. Besides the clause of reimbursement at the end of the will is, in respect of costs, incurred in the execution “of the trusts hereby in them reposed,” evidently referring to all the trusts, and not merely the trusts of the real and leasehold property. If, then, the whole property be in trust, and the trusts do not exhaust it, can it be contended, that the unexhausted part goes to the trustee? And will it make any difference, that the

(a) 11 Geo. 4 & 1 Will. 4, c. 40.

(b) 1 Ves. & B. 260.

(c) 2 Bro. C. C. 589.

(d) 17 Ves. 435.

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trustee happens, in a subsequent part of the will, named executor? Upon the whole, it is submitted the executors were not intended to take a beneficial est in the residue: *Dawson v. Clark*, *Dean v. Dalt*, *Milnes v. Slater* (b), *Rhodes v. Rudge* (c).

Mr. *Bacon*, in reply, contended, that, as in the case of real estate devised in trust, the part not wanted for the trust would result to the heir-at-law, so, in the case of a trust of personalty, the part unexhausted by the trust *prima facie* go to the executor for his own benefit.

The VICE-CHANCELLOR.—In this case, which it has been agreed on both sides must be considered independent of Sir *Edward Sugden's* Act, the only question which the court has been asked to decide is, whether, upon the will of the testator in the cause, an intention appears that John Bowman, Dinah Bowman, and Ann Bowman should not take the clear residue of this present estate beneficially.

The testator gives the gross residue of his personal estate, that is, gives the whole of his personal estate, except such parts which he has specifically bequeathed, to these three persons in trust to convert it into money and apply the proceeds thereof towards payment of his debts and funeral and testamentary expenses, but his wearing apparel to be given away to whom they may think fit. That is followed by an appointment of the same three persons to be executors.

I have asked whether any case is known to exist in which, without any words of charge, the gross residue of the personal estate being given to persons upon trust to pay the debts, or debts and testamentary and funeral expenses without more, the same persons being appointed executors, it has been held, that, either by force of the express g

(a) 2 Bro. C. C. 634.

(b) 8 Ves. 295.

(c) 1 Sim.

by force of the appointment of them to be executors, those executors take the residue beneficially. I do not remember any such case, and it appears to be the impression at the bar, as it is my impression, that no such case exists.

Considering that circumstance, considering the language of Lord *Eldon* in the case of *Dawson v. Clark*, and in that of *King v. Denison*, and considering the language of every part of this will, I cannot say that there is not an intention manifested upon the will, that John Bowman, Dinah Bowman, and Ann Bowman should not take the clear residue of the personal estate beneficially.

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May 4th & 8th.

THE original bill was filed by Sir John Nelthorpe, Bart., and Lawson Holmes, against Edward and Sarah Holgate, for the purpose of enforcing the specific performance of a

A. contracted to purchase an estate of B., being at the same time under a secret understanding

with C. to sell the estate to him; and a contract was afterwards entered into between A. and C. to that effect:—*Held*, that a bill for specific performance was maintainable by A. and C. against B.; and the price being adequate, and it not being suggested by B. that he had ever refused, or was unwilling, or would have objected to treat with B., or might have obtained better terms from him, had he known the real circumstances of the case, the Court decreed specific performance against him.

If a defendant cannot object to a party being made a co-defendant, he cannot object to his being made a co-plaintiff, if the interests of the several co-plaintiffs are not conflicting.

Quere, in what cases successive purchasers are properly made parties to a suit for specific performance?

A person, seised in fee of an estate subject to the life-interest therein of his mother, and having knowledge of his mother's interest, contracted to sell the estate to a party who had no actual knowledge of her interest, but knew, or might have known, that she resided on the property as tenant or occupier:—*Held*, that, although the mother's residence might, as between her and the purchaser, have carried constructive notice of her rights, it was not necessarily notice as between the vendor and purchaser (in those respective characters), so as to deprive the purchaser of his right to compensation in respect of the life-interest.

A vendor contracted to sell an estate in fee, with a stipulation, that if any dispute should arise as to the title, the same should be submitted to some eminent conveyancer, and that in case he should be of opinion that a good title could not be made, the contract should be rescinded. Upon the delivery of the abstract, it appeared that the vendor's mother had a life-interest in the premises, and that her interest was known to the vendor at the time of the contract. Upon her refusing to join in the conveyance to the purchaser:—*Held*, that the vendor was not entitled to rely on the before-mentioned stipulation as a ground for rescinding the contract, but that the contract must be specifically performed, with compensation in respect of the life-interest.

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contract for the sale of an estate to the plaintiffs, or one of them, under the following circumstances:—

Edward Holgate, being seised in fee, subject to the life interest therein of his mother, Sarah Holgate, of a certain freehold messuage and lands situate at Sturton, in the parish of Scawby, in the county of Lincoln, and upon which he and his mother had resided since 1816, agreed in March 1841, with Lawson Holmes, for the sale of the premises to him at the price of £6000. and thereupon an agreement in the following terms was signed by the parties:—

“Memorandum of agreement made and entered into on the 29th March, 1841, between Edward Holgate, of &c. farmer, for himself, his heirs, executors, and administrators of the one part, and Lawson Holmes, of &c., for himself, his heirs, executors, and administrators, of the other part, as follows:—First, the said Edward Holgate hath agreed to sell, and the said Lawson Holmes hath agreed to purchase all the messuages &c. [here followed the parcels of the property agreed to be purchased], at or for the price or sum of £6000 subject to a quit-rent, out-rent, or tithe-rent of 6s. 9d. per annum charged upon some portion of the estate. The purchaser shall take the quantity as above stated whether more or less * * *. The purchase to be completed on the 1st day of April 1842, when the purchaser is to have possession of all the said premises, except the messuage or messuages and garden of which the purchaser is to enter into possession on the 1st day of May, 1842. The said Edward Holgate, at his own expense, to make out good title to the said estate, and the purchaser to be at the expense of his own conveyance. And it is hereby agreed and declared that if any dispute shall arise as to the title the same shall be submitted to some eminent conveyancer to be agreed upon by both parties: such objections to stated in writing, within six months of this date, to the said Robert Chesser, the arbitrator in the matter: and in case shall be of opinion that a good title cannot be made

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subject as aforesaid, that then either of the said parties hereto shall be at liberty to rescind the contract on two calendar months' notice after the opinion of counsel shall be obtained * * *. And it is hereby further agreed, that all outgoings, payable for and in respect of the said premises to the said 6th day of April, 1842, shall be paid by the said Edward Holgate, his executors and administrators. And lastly, the said Lawson Holmes hereby agrees to pay the sum of £6000 on the 6th day of April, 1842, on having a proper conveyance of the said premises made and executed to him agreeably to this agreement. As witness the hands of the said parties, the day and year first above written. Edward Holgate, Lawson Holmes."

In July of the same year, Holmes agreed with Sir John Nelthorpe, who possessed property in the same parish, for the sale to him of the premises upon the same terms and conditions under which Holmes had contracted to purchase them. This agreement was reduced into writing and dated the 24th July, 1841, and was signed by Holmes, of the one part, and Henry Grantham, as agent for Sir John Nelthorpe, of the other part.

On the 29th July, the defendant Edward Holgate, by his solicitors, caused an abstract of title of the premises to be delivered to Nicholson and Hett, the solicitors of Holmes, who were also the solicitors of Sir John Nelthorpe.

It appearing by the abstract that Sarah Holgate had a life-interest in the premises, Nicholson and Hett, upon returning the abstract, required that the tenant for life should join in the conveyance, or release the estate. An answer was returned by Holgate's solicitor, dated the 18th December, 1841, stating the refusal of Mrs. Holgate to accede to this requisition.

A correspondence then ensued between the solicitors on both sides; the defendant's solicitors insisting that the objection on the part of the tenant for life to join in the conveyance was an *unforeseen* difficulty as to title, and that

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as such it came within the operation of that clause of the agreement of March, 1841, relating to disputes as to title; and they suggested that, if necessary, the point should be referred to a conveyancer, under the terms of that clause. On the other hand, the plaintiffs' solicitors insisted that their clients were entitled to specific performance, with compensation in respect of Mrs. Holgate's life interest. In a letter from them to the defendant's solicitors, dated the 12th February, 1842, they observed that the vendor was bound to obtain the signature of the tenant for life; that the matter in question was not within the clause referred to; that it was not a dispute of title; that the vendor must have been perfectly aware, when he contracted, that his mother's signature was requisite; and they proposed to leave an adequate part of the money in the purchaser's hands during Mrs. Holgate's life; and that the vendor should enter into a bond of indemnity for the purpose of securing to the purchaser during that time the quiet enjoyment of the estate. They afterwards offered, upon receiving possession of the farm, to allow Mrs. Holgate to remain in the dwelling-house during her life.

The propositions on the part of the plaintiffs were resisted by the vendor, who asserted that, when he originally contracted, he had no knowledge of his mother's objection to join, and that he had no power to give up the premises upon such conditions. A letter, however, referring to the last offer of the plaintiffs, was sent by the defendant's solicitor to one of the plaintiffs' solicitors on the 29th of April, 1842, and was in the following terms:—"I mentioned to my client your suggestion as to the purchase of his reversionary interest in the Sturton estate. He will be glad to sell to Sir John, if they can agree on terms; will you make me an offer of the most you will give? I am, &c., R. O."

To this letter no answer was returned.

The original bill was filed on the 19th July, 1842. It charged, amongst other things, that, shortly after the date

of the agreement of July, 1841, the plaintiffs caused notice thereof to be duly given to the defendant Edward Holgate; and that he had dealt with them accordingly. It also charged, that, until the delivery of the abstract, the plaintiffs had no notice of the defendant Sarah Holgate's interest in the premises, but that they had lately discovered that the agreement of March, 1841, was entered into with the privity of Sarah Holgate; that she entered into an arrangement with the defendant Edward Holgate as to the price of her interest &c.; that she had agreed to join with him in the conveyance of the premises to the plaintiffs; and that he could compel her to join in such conveyance.

The bill prayed that the defendant Edward Holgate might be decreed specifically to perform the agreement of the 29th March, 1841, to make a good title, and, if necessary, to procure Mrs. Holgate to join; and that, if necessary, she might be decreed to join in the conveyance, the plaintiff Nelthorpe being ready, upon having a good title, having a conveyance made to him, and being let into possession, to pay the £6000, &c. But if the Court should be of opinion that Mrs. Holgate could not be compelled to join, then, that the plaintiffs might be declared entitled to the benefit of their agreement to the extent of Edward Holgate's interest, and that a proper abatement might be made in the purchase-money in respect of the interest of Mrs. Holgate, the plaintiff Nelthorpe being ready to pay the balance &c.

The defendant Edward Holgate, by his answer, alleged as follows:—"That no notice of such alleged sub-sale or sub-agreement was ever given to the defendant by the plaintiffs, or either of them; and he, therefore, denies that the plaintiffs, or either of them, did cause notice of the said last-mentioned alleged agreement of purchase to be given to the defendant. That, in fact, the defendant infers, under the circumstances hereinafter mentioned, that the original purchase was made for, and on behalf of, the

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said plaintiff Sir John Nelthorpe. That, in the subsequent proceedings in relation to the said sale, the last-mentioned plaintiff was treated and considered as the purchaser thereof. That Henry Grantham, who by the bill is stated as the party executing the alleged sub-contract for purchase as agent for the plaintiff Sir John Nelthorpe, is, and was at and prior to the date and execution of the contract for sale by the defendant, now in question in this suit, steward or agent of the last-mentioned plaintiff, Sir John Nelthorpe, and, as the defendant believes, actively instrumental in the endeavour to purchase and obtain the property comprised in the said contract for the said last-mentioned plaintiff, and in the actual contract which was obtained from the defendant through the agency of the said plaintiff Lawson Holmes. That the said Henry Grantham was (and, as the defendant supposes, and will, if necessary, endeavour to prove, the plaintiffs themselves were) well aware of, and had notice of, the defendant Sarah Holgate's life-estate in part of the aforesaid premises, and the said contract was entered into with such full knowledge and notice in the said plaintiffs, by themselves or their said agent, of such life-estate. That the rescinding clause contained in the aforesaid contract was supposed and intended to meet any defect of title or otherwise which might expose the defendant to any difficulty or litigation in reference to such sale. That the plaintiff Sir John Nelthorpe is already possessed of a large estate in the parish of Scawth in the county of Lincoln, and the lands in question in this suit lie contiguous to the before-mentioned estate; and was and is, as the defendant believes, considered that the same lands would be a most desirable and valuable acquisition and addition to the said last-mentioned plaintiff's said estate. That he has discovered that the said Sir John Nelthorpe, being desirous of possessing the defendant's said property, the said plaintiff, Lawson Holmes, was employed by, or on behalf of, the said plaintiff Sir John Ne

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thorpe, through the secret instrumentality of the said Henry Grantham, to endeavour to purchase the same nominally for himself, but in reality for and on behalf of the said Sir John Nelthorpe ; and, accordingly, the said plaintiff Lawson Holmes called upon the defendant prior to the said contract, and stated his wish to purchase the said property. That, having no desire to sell the said property, the defendant would not at first entertain the proposition at all, but, having been much pressed by the said Lawson Holmes, the defendant at last told him, that, if he sold at all, he must be tempted by the price ; and the plaintiff Lawson Holmes having at last agreed to give the defendant £6000 for the same, the defendant ultimately agreed to sell for that sum, which was and is considerably more than the supposed value of the estate, the defendant thinking it highly probable that his mother would be also tempted by the price, and would concur in the said sale." The defendant then denied the statements contained in the bill as to the alleged agreement between him and his mother ; and he insisted on his right to rescind the contract on the ground of the unforeseen difficulty of title, not being aware, at the time of the original transaction, that his mother would not join in the conveyance. He submitted, that the institution of the suit by the plaintiffs was premature and vexatious, and that the bill ought to be dismissed with costs.

After this answer had been filed, the plaintiff Holmes died ; whereupon such further proceedings were had as are mentioned in the judgment in this case.

The cause now came on for hearing.

It appeared from the plaintiffs' evidence, that the defendant Edward Holgate had, ever since the death of his father, lived with his mother on the farm, and that they had for some years jointly conducted it, though latterly it had principally been managed by Edward Holgate.

With respect to the question of Holmes's agency, Gran-

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tham, in his examination for the plaintiff, stated that he, as agent of Sir John Nelthorpe, advised him to purchase the property, and requested Holmes to do so on Sir John Nelthorpe's behalf. This deponent also stated, that he never knew, until after the 24th July, 1841, that Mrs. Holgate had a life-interest in the premises, but up to that time believed that Edward Holgate was absolute owner. On his cross-examination, he stated his belief, that Holmes purchased *bond fide* for himself, with an understanding that Sir John Nelthorpe should afterwards purchase of him.

On the part of the defendant, evidence was entered into for the purpose of shewing that it was matter of notoriety in the neighbourhood, from the circumstance of her residence on, and management of, the farm, that Sarah Holgate had a life-interest in the premises. The evidence, however, on this point was conflicting.

Mr. *Wigram* and Mr. *Heathfield*, for the plaintiff, contended, that their client was, under all the circumstances of the case, entitled to a decree for specific performance, with compensation in respect of Mrs. Holgate's life-interest. It was clear, that the vendor had all along knowledge of her interest, though the purchaser had not. It was immaterial, also, that the contract had shifted from Holmes to Sir John Nelthorpe. It was not suggested, that any fraud had been committed on the defendant Edward Holgate, nor even that he would not have dealt with Sir John Nelthorpe, had he been the original purchaser. The case, therefore, notwithstanding the words "secret instrumentality," which had been adroitly introduced into the answer by the pleader, was clearly distinguishable from *Phillips v. Duke of Buckingham* (a) and *Scott v. Langstaff* (b). They relied on *Tanner v. Smith* (c), *Fellowes v. Lord Gwydyr* (d),

(a) 1 Vern. 227.

(b) Lofft, 797, 798, cited.

(c) 10 Sim. 410.

(d) 1 Sim. 63.

Mortlock v. Buller (a), *Wood v. Griffith* (b), *Milligan v. Cooke* (c), *Dale v. Lister* (d), and distinguished the present case from *Thomas v. Dering* (e).

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Mr. *Russell* and Mr. *Rogers*, for the defendant Edward Holgate.—The plaintiff, having set out with concealment and misrepresentation, and having so proceeded to the hearing, now states at the bar, that his title is entirely fictitious. At the bar, he says, that Holmes entered into the contract as his agent and on his behalf. No such case appears in the pleadings; it is extracted only from the answer to the cross bill of discovery. Holmes was made plaintiff in this suit as a purchaser on his own account; and the evidence of Grantham is to that effect. The manner, therefore, in which the plaintiff now brings his case before the Court furnishes in itself sufficient ground for the dismissal of his bill.

Secondly, that clause in the agreement which enables either party to rescind the contract in case a good title cannot be made out, is applicable to the present circumstances. The tenant for life refusing to concur in the sale, the defendant cannot make a good title, and the plaintiff cannot insist on specific performance, with compensation: *Williams v. Edwards* (f), *Collier v. Jenkins* (g), *Wheatley v. Slade* (h).

Thirdly, if Holmes was a purchaser on his own account, there was a misjoinder of plaintiffs in this suit, inasmuch as, in general, the only proper parties to a bill for specific performance are those who sign the contract: *Tasker v. Small* (i). [The *Vice-Chancellor*.—That case seems to have little or no application to the present.] If A. contracts to

(a) 10 Ves. 292.

(b) 1 Swanst. 43.

(c) 16 Ves. 1.

(d) Id. 7, cited.

(e) 1 Keen, 729.

(f) 2 Sim. 78.

(g) 1 Younge, 295.

(h) 4 Sim. 126.

(i) 3 Myl. & Cr. 63; 6 Sim. 625.

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sell to B., and then contracts to sell to C., it is improper to make both purchasers parties to a bill for the specific performance of either of the contracts : *Cutts v. Thodey* (a).

Lastly, if specific performance be decreed, it must be without compensation for Mrs. Holgate's life-interest. The plaintiff had notice of her tenancy ; and notice of the existence of the tenant is notice of whatever interest the tenant has. [The *Vice-Chancellor*.—As between him and her he must probably be taken to have had notice of the nature of her interest.] At all events, there was sufficient to put the plaintiff on inquiry.

Mr. *Simpkinson*, for the defendant, Mrs. Holgate.

Mr. *Teed* and Mr. *Campbell*, for the heir-at-law and administratrix of Lawson Holmes.

Mr. *Wigram*, in reply, referred to *Crosbie v. Tooke* (b) and *Morgan v. Rhodes* (c).

In addition to the authorities already referred to, the case of *Mason v. Franklin* (d) was mentioned upon the question of parties and *White on Revivor and Supplement*, chap. 6, as to the competency of the present plaintiff to revive the suit.

(a) Cor. V. C. E. Nov. and Dec. 1842. See 6 Jur. 1027. This was a bill by the first purchaser against the vendor Thodey, and against Vickers, the second purchaser of the property in question, and another party, Hoggart, for specific performance of the agreement between the vendor and the plaintiff. It appeared that Vickers purchased with notice of the plaintiff's contract, and agreed to pay a less consideration than the plaintiff's. The *Vice-Chancellor* of England decreed specific performance of the

agreement, but that the bill should be dismissed against Vickers, without costs, and against Hoggart, with costs. The plaintiff appealed from the latter part of this decree, and the appeal was heard before Lord *Lyndhurst*, C., on the 15th February, 1844, when his Lordship affirmed the decision of the *Vice-Chancellor*, with costs. For a short statement of the proceedings upon the appeal, see post, p. 323.

(b) 1 M. & K. 431.

(c) Id. 435.

(d) 1 Y. & C. C. C. 239.

The VICE-CHANCELLOR.—This suit was instituted by Sir John Nelthorpe and Mr. Holmes, as co-plaintiffs, against Mr. Holgate and his mother, Mrs. Holgate, for the specific performance by them of a written contract, dated in March, 1841, made between Mr. Holmes and Mr. Holgate for the sale by Mr. Holgate to Mr. Holmes of the fee-simple in possession of a farm in Lincolnshire; the bill alleging, that Mrs. Holgate, having or claiming a life-interest in part of the property, had sanctioned or affirmed the agreement in respect of that interest; and also alleging, that in July, 1841, a written contract had been made between the two plaintiffs for the sale of the farm by Mr. Holmes to Sir John Nelthorpe upon terms substantially the same between them as those of the original contract between Mr. Holgate and Mr. Holmes. After the bill had been answered, but before either party had gone into evidence, Mr. Holmes died intestate, and Sir John Nelthorpe then filed a bill of revivor, or of revivor and supplement, against the original defendants, and the heir and personal representative of Mr. Holmes, for the purpose of making the suit effectual.

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Upon these two bills the present parties have joined issue, and witnesses have been examined for Sir John Nelthorpe and for Mr. Holgate, who filed a cross bill for discovery, which the late Mr. Holmes died without answering, but which has been answered by Sir John Nelthorpe. There has not been any answer, I may observe, to the bill in which Sir John Nelthorpe is the sole plaintiff, but no objection has been taken in argument on that ground, and, supposing any such objection capable of being successfully taken, if not waived, it has, I conceive, been waived.

The two contracts have been proved, and no objection arises on the face of either; but it is established by the evidence that Mr. Holmes, as between himself and Sir John Nelthorpe, obtained and entered into the first contract, either as the agent and on behalf of Sir John Nelthorpe, or at the request of Sir John Nelthorpe's agent,

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and with the view on their part, and under a promise on Mr. Holmes's part, to Sir John Nelthorpe, that he should be allowed to purchase from Mr. Holmes the property in question on the same terms as Mr. Holmes and Mr. Holgate might agree to. Whether Mr. Holmes, as between himself and Sir John Nelthorpe, entered into the first contract strictly or exactly as the agent of Sir John Nelthorpe and on his behalf, is, on the whole evidence, not to my apprehension, clear. But, I think, it plainly appears that Mr. Holmes, Sir John Nelthorpe, and his agent Mr. Grantham, all, from the beginning and throughout, meant Sir John Nelthorpe to have the property, and that Mr. Holmes entered into the agreement of March without any notion of keeping the property himself, or of not being indemnified by Sir John Nelthorpe.

Whether, under all the circumstances as they really existed, if the contract of July, 1841, had not been signed, the provisions of the Statute of Frauds would, as between Sir John Nelthorpe and Mr. Holmes, have enabled Sir John Nelthorpe to reject the contract of March, if so disposed, or have enabled Mr. Holmes to keep the property and refuse to recognize any right or claim in Sir John Nelthorpe—what exactly was the origin or design of the contract of July, or what exactly is the character to be ascribed to that contract, I do not, and perhaps with confidence I could not, say; but these are questions, which, in my view, are not necessary to be decided, and which I do not decide.

It is not proved that Mrs. Holgate sanctioned or authorized the contract of March, and the plaintiffs' allegations in that respect must be treated, judicially, as without foundation. Nor is it proved, nor can I judicially consider, that before or when Mr. Holgate entered into that contract he was informed or had notice, actually or constructively, either that Mr. Holmes was not a principal in the transaction, or was under any promise or engagement respecting the agreement or the property, or that Sir John Nelthorpe

had, or was to have, anything to do with the matter ; and it is, I think, a just conclusion from the evidence, that Sir John Nelthorpe, Mr. Grantham, and Mr. Holmes, all, from the beginning and throughout, believed Mr Holgate to be less likely to treat with Sir John Nelthorpe for the purchase than with any other person, and, if treating with him, to be likely to ask from him a price larger than Mr. Holgate would ask from any other person. The reason may probably have been, that Sir John Nelthorpe was a large landholder, residing in the immediate neighbourhood, to whom the acquisition of the farm in question might naturally be supposed, and may be taken as particularly desirable. I must consider the belief that I have mentioned to have led Mr. Holmes, Mr. Grantham, and Sir John Nelthorpe to the course that they adopted.

It is not proved, and I cannot judicially conclude, that, when the contract of March was made, Mr. Holmes or Sir John Nelthorpe knew, or had actual notice, or (as between them and Mr. Holgate, or for any purpose of this suit) constructive notice, of the existence of any estate or interest in Mrs. Holgate, though many persons in the neighbourhood were aware of the fact, and though she was residing with her son Mr. Holgate on the property, which was farmed latterly by him. Mrs. Holgate's residence on the farm may well, as between herself and Sir John Nelthorpe and Mr. Holmes, have carried with it constructive notice of her rights, supposing that material to her ; but it does not follow that it was notice as between Mr. Holgate in his character of vendor, and Sir John Nelthorpe or Mr. Holmes in the character of purchaser. Her estate and interest, whatever they were, are admitted at the bar by Mr. Holgate's counsel to have been, at the time of the contract of March, known to Mr. Holgate and his solicitor Mr. Owston, who prepared that contract.

It is not proved, nor is there reason to believe, that any misrepresentation whatever was made to Mr. Holgate or

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his solicitor, unless so far, if at all, as it was a tacit misrepresentation in Mr. Holmes to deal as he did, without disclosing the circumstances that I have mentioned. Subject only to this qualification, if it is a qualification, the contract of March, 1841, must be viewed as one in all respects perfectly fair on the purchaser's part. The price may, upon the evidence, be considered as not only sufficient, but high, and Mr. Holgate had Mr. Holmes's personal liability on the agreement.

As it is not proved that Mrs. Holgate sanctioned or affirmed this contract, the bills as against her must be dismissed with costs, to be paid by Sir John Nelthorpe; and as the representatives of Mr. Holmes have not opposed Sir John Nelthorpe's case, they must have their costs from him also.

The real contest is, and has been, between Sir John Nelthorpe and Mr. Holgate; the latter resisting the suit altogether, and insisting, that, both upon form and upon the merits, the bills against him should be wholly dismissed, but that, if there ought to be specific performance at all, it ought to be without any compensation or allowance on the ground of Mrs. Holgate's life-estate: Sir John Nelthorpe, on the other hand, insisting, that he is entitled to a compensation and allowance in respect of it.

The existence of any employment, connexion, or communication, of whatever nature, before the written contract of July, or independently of it, between Sir John Nelthorpe, Mr. Grantham, and Mr. Holmes, or any of them, is not stated or suggested by either of Sir John Nelthorpe's bills. His rights or claims in respect of the contract of March are not, upon the pleadings, represented as having any other origin than the contract of July. This however, considering especially what is put in issue by the first answer of Mr. Holgate, appears to me not to be an objection fatal to the suit; an observation applicable also to the failure of the case made against Mrs. Holgate—

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These are not grounds upon which, in my judgment, relief ought to be refused to Sir John Nelthorpe, if he is otherwise entitled to it against Mr. Holgate; a conclusion to which I come, independently of the cases of *Parsons v. Briddock* (a), *Gordon v. Gordon* (b), *Attwood v. ———* (c), and *Taylor v. Tabrum* (d), but, without forgetting those cases; and whether viewing the original plaintiffs as principal and agent, or as purchaser and sub-purchaser, I think that they were not improperly co-plaintiffs, and that, after Mr. Holmes's death, the suit was with sufficient formality and propriety continued by the surviving plaintiff as the sole plaintiff, making such persons defendants, as he did make defendants, to his second bill.

The agreement of July, 1841, may have been necessary to establish or evidence a title in Sir John Nelthorpe against Mr. Holgate and Mr. Holmes, or one of them; and, supposing it not necessary for such a purpose, I cannot view it as wholly immaterial or irrelevant. It was prepared and signed before the abstract was delivered. Mr. Holgate's first answer contains these passages with respect to Sir John Nelthorpe's connexion with the agreement of March. [His Honor here read the passages of the answer before set out: see *ante*, p. 207.] Under such circumstances, I find it impossible to say that the mode in which Mr. Holmes and Sir John Nelthorpe have stated their case and title, or the case and title of either of them on this record, has to any extent or in any manner damaged or prejudiced Mr. Holgate.

Then, with regard to the question of joinder, and to the question of Sir John Nelthorpe being the only plaintiff in the bill of revivor, or of revivor and supplement; supposing the contract of March one fit to be enforced in equity against Mr. Holgate at all, it must be admitted that one at least of the original plaintiffs was a proper plaintiff

(a) 2 Vern. 608.

(b) 3 Swanst. 400.

(c) 1 Russ. 353.

(d) 6 Sim. 281.

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for the purpose. Had the suit been so constructed as to make one of them the only plaintiff, I apprehend that Mr. Holgate could not have been heard to say that the other, if made a defendant, was improperly so made; nor can it be said that either of the plaintiffs was, when the suit was instituted, without an interest in the subject of the suit, or that their interests were or are conflicting. There is not, nor ever has been, any dispute or question between Sir John Nelthorpe and Mr. Holmes, or between Sir John Nelthorpe and either of the representatives of Mr. Holmes, who was personally, and whose estate is, liable to Mr. Holgate, by means of the contract of March, if for any purpose valid. If, then, one of the plaintiffs in the original suit was a proper and necessary plaintiff, and there was no conflict of interest between them, and each was concerned and interested in the subject of the suit, how could it be improper that they should be co-plaintiffs? The ordinary rule against making an agent a party has nothing in common with a case such as this. The bill of the two plaintiffs thus, in my opinion, properly framed as to parties having been answered, and the suit in active progress, how could it be destructive of the suit or irregular, that Sir John Nelthorpe should alone revive and prosecute it against the original defendants, and the representatives of Mr. Holmes after his death? I think that it was not; and, in forming that opinion, I have not been solely, if to any extent, influenced by the consideration that the objections made are made at the hearing, and not upon a plea or demurrer, and that there has been neither plea nor demurrer to either bill, nor any answer to Sir John Nelthorpe's sole bill, nor any objection taken to the order of revivor; or by the consideration that after Mr. Holmes's death, had Sir John Nelthorpe not proceeded with the suit, he would have been liable to have the joint bill dismissed with costs to be paid by him upon Mr. Holgate's application, in default of reviving within a reasonable time; or by the con-

sideration of the direct dealings between Holgate's solicitors and Sir John Nelthorpe's solicitors in that character, which took place respecting the abstract and title.

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This brings us at last to the more substantial part of the case: and, first, as to the undisclosed connexion between Sir John Nelthorpe and Mr. Holmes, with reference to the agreement of March, upon which Mr. Holgate also insists as fatal to the suit. It must at the outset be remembered, that there is neither any proof, nor any averment, nor any reason to suspect that Mr. Holmes, or Sir John Nelthorpe, or Mr. Grantham, or any solicitor or agent of Sir John Nelthorpe, in answer to any question put to either of them or otherwise, has, at any time or upon any occasion, before or since the contract of March, asserted that Mr. Holmes was concerned or engaged in the treaty or contract of March, not as an agent, or not as a trustee; and though it certainly is not proved, or to be judicially considered, that, when Mr. Holgate signed that agreement, he thought or suspected that Mr. Holmes was not dealing solely on his own account, yet such a notion is not inconsistent with either of Mr. Holgate's answers in the cause, and is a supposition in support of which, if I had found evidence among the proofs in the cause, I should not have been at all surprised. I have looked in vain through the two answers of Mr. Holgate for an assertion or a suggestion on his part, that he had ever refused, or declined, or expressed or felt any disinclination to treat or contract with Sir John Nelthorpe, or to sell to him; or that Mr. Holgate, if he had known or suspected Sir John Nelthorpe to have, or to be intended to have, the benefit of the purchase, or an interest in the purchase, would not have entered into the contract; or that there was any ground of objection to dealing with Sir John Nelthorpe; or that Mr. Holgate would or might have obtained better terms from Sir John Nelthorpe than from any other person, or a better price if he had known the real circumstances; or that he acted on the

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faith that Holmes was a principal and not an agent in the matter, or anything to any such effect. And there is an equal absence of evidence to any such effect. How, then, under such circumstances, the price being sufficient and high, can I, upon the mere ground of that belief having been entertained by Sir John Nelthorpe, Mr. Grantham, and Mr. Holmes, which I have stated, and having actuated them, say that Mr. Holgate is not bound by his agreement? Such reasons are too weak and unsubstantial to form a ground upon which a court of justice can base its decisions. Questions of mere delicacy are not within its province.

By the law of this country, as administered in every court of Westminster Hall, the mere act of contracting with another in the name of an agent, that agent making himself liable, and not disclosing that he does not in truth contract on his own behalf, is not forbidden, but may effectively take place. If this right be exercised from a belief, well or ill founded, that, were the real relation between the agent and his principal known, the other party would, from mere caprice, or unreasonably, or from a bad motive, decline to contract, or would use the knowledge for the purpose of extortion, that can make no difference. Nor is the rule one that must be sought in the recesses of the law, familiar only to its professors. It is, on the contrary, one trite and popular, lying in the common track of ordinary life under the daily observation of all classes of men. Why, then, it may be asked,—if Mr. Holgate deemed the question for whom Holmes was contracting with him, one of any importance,—if he thought it a matter of consequence whether the estate that he proposed to alienate was to be enjoyed by this or that man,—if it was an interesting point to be satisfied from what purse the money to be paid to him was to proceed,—or if he considered one man likely to be more malleable or flexible, more liable to pressure, or less cool in the operation of a bargain than another, and that this

might be fairly made a source of gain,—was not a question asked by him or Mr. Owston of Mr. Holmes or his solicitor, the answer to which, if false, might possibly have given a defence against the contract; if true, or evasive, might possibly have stopped the progress of the transaction? No such question was asked; and it may be, perhaps, conjectured, that no information on such a topic was needed, or was thought material.

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The answers in the cause, I may add, would not have been less satisfactory, had it been stated by either of them when, how, or by what means Mr. Holgate first discovered, or first suspected, that, before or when the contract of March was made, Sir John Nelthorpe or Mr. Grantham had any communication on the subject with Mr. Holmes, or anything to do with the matter. But this is one of the heads also on which Mr. Holgate is silent. An eminent writer (a) has said: "*Neque enim id est celare quidquid reticeas; sed cum, quod tu scias, id ignorare, emolumenti tui causâ, velis eos quorum intersit id scire;*" a description or proposition within which, according to a just exposition of the expressions, "*emolumenti tui causâ,*" and "*intersit id scire,*" the present case certainly, in my judgment, is not.

It is then said, that the existence of the life-estate of Mrs. Holgate, which is an objection, but probably the only objection, to her son's title, is a matter that was offered by his solicitor to be referred to a conveyancer, and entitles him, unless Sir John Nelthorpe will waive it, to be delivered from the contract of March, 1841, under this clause contained in it:—"And it is hereby agreed and declared, that, if any dispute" &c. [His Honor here read the clause as already set out (b).] But this objection of Mrs. Holgate's life-interest (she being entitled to reject, and rejecting, the agreement) is, as an objection to her son's title, one of a plain and unquestionable nature. The fact was

(a) Cic. de Off. l. 3, c. 13.

(b) See ante, p. 204.

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perfectly well known to him when he entered into the agreement, and has, ever since the delivery of the abstract, been uniformly admitted on each side. 'There was not any dispute on this subject beyond the question of compensation or no compensation for a plain, clear, and admitted defect; and, if there had, a conveyancer has never been agreed on. If, indeed, Mr. Holgate had satisfied the Court, that he entered into the contract of March in ignorance of his mother's life-estate, or under a mistaken notion, that he was entitled to sell and could make a title to the fee-simple in possession without her concurrence, or in consequence of any promise or representation on her part, that she would concur in the sale; or, if he had shewn, that, when the agreement was made, either Mr. Holmes, Mr. Grantham, or Sir John Nelthorpe knew, or had, as between them and Mr. Holgate, notice, of Mrs. Holgate's interest or her son's inability to make a title without her consent, the case would have been different, and might, possibly, have been materially different from its present position. But, considering what is proved and what is not proved in the cause,—considering, that Mr. Owston has not, but might have been examined as a witness,—considering, that, when the agreement was made, Mr. Holgate knew, and Mr. Holmes and Sir John Nelthorpe did not know, of this objection to the title,—considering, that there has not been on the subject any mistake, on Mr. Holgate's part, in the view and understanding which the Court has of that expression,—and considering, that, by obtaining Mrs. Holgate's concurrence, he might have enforced against the will of Mr. Holmes and Sir John Nelthorpe, and may now obtain, specific performance of the agreement without compensation,—I cannot accede to the argument founded on the clause that I have just read, so far as this life-interest is concerned, but must hold Sir John Nelthorpe entitled to a specific performance, and that, unless Mrs. Holgate shall concur, her life-interest must be matter of compensation, supposing the title

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good or accepted in other respects. I so decide upon the ground of the particular circumstances of this case, without acceding to the broad and general argument which has been urged on the plaintiff's part, as to the performance of contracts with compensation, wherever the vendor can give part, but not the whole, of what he has contracted to sell, and without saying what will be the effect of any other valid objection to the title appearing.

There must be a general reference of the title, subject to Mrs. Holgate's rights, if the plaintiff desires it; in which case, an inquiry as to the nature and value of Mrs. Holgate's interest must be deferred or contingently directed.

I do not think it right to make any reservation as to the costs which Sir John Nelthorpe is to pay to Mrs. Holgate, or to the representatives of Mr. Holmes.

Considering the defence made by Mr. Holgate, it must be declared, that he is to have no costs to this time either of this suit or the cross-bill; and is to pay Sir John Nelthorpe's costs of this suit to the present time from the time of filing of the replication. The silence of the bills in this cause as to the agency or other connexion between him and Mr. Holmes before the agreement of July, the additional matter brought on the record by the arrangements between them, and, indeed, the circumstances of the case generally, induce me to say, that Sir John Nelthorpe should have no earlier costs, and should receive no costs of the cross-bill. All costs from the present time must be reserved.

CUTTS v. THODEY (a).

By the decree made on the hearing of this cause by the *Vice-Chancellor of England*, his Honor was pleased to declare, that the agreement entered into between the plaintiff and the defendant Winwood Thodey, dated the 19th day of June, 1835, ought to be specifically performed and

(a) See ante, p. 312.

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carried into execution, &c., with the usual reference to the Master as to title. And it was ordered, that the plaintiff's bill should be dismissed as against the defendant Charles Vickers without costs, and as against the defendant C. L. Hoggart with costs, to be taxed by the Master ; and that such costs, when taxed, should be paid by the plaintiff.

From this decree, so far as it related to the defendants Vickers and Hoggart, the plaintiff appealed, on the ground that the bill ought not to have been dismissed against either of them ; but that, if the decree was right in dismissing the bill as against Hoggart, with costs to be paid by the plaintiff, the consideration whether those costs should be ultimately borne by the plaintiff or the defendant Thodey ought to have been reserved (a).

The appeal came on for hearing before Lord *Lyndhurst*, C., on the 15th February, 1844, when

Mr. *Lee* and Mr. *Heathfield*, for the plaintiff, contended that the decree was wrong in dismissing Vickers, for he claimed the benefit of the contract between him and Thodey, and the plaintiff was entitled to call for the judgment of the Court upon the effect of that contract. Thodey had no right to sell after his agreement with Cutts ; and Hoggart, who had made that contract, retained the deposit, and had notice from the plaintiff, ought not to have been active about the second sale.

Mr. *Wood*, for Thodey, cited *Tasker v. Small*, 3 Myl. & C. 63, and *Wood v. White*, 4 M. & C. 460, as shewing that Vickers ought not to have been a party. He also urged, that this was virtually an appeal for costs.

Mr. *Rasch*, for Vickers.

Mr. *Wakefield* and Mr. *Rogers*, for Hoggart, contended that the plaintiff should not have brought him to a hearing.

Mr. *Lee*, in reply, contended, that this case was distinguishable from those cited by the counsel for Thodey. Those cases applied to incumbrances upon a title, which the owner might clear away when he pleased, not to adverse claims such as those of Cutts and Vickers.

The LORD CHANCELLOR said, that Lord *Cottenham's* decision was expressed in general terms, and must be understood to apply to such a case as this ; and he affirmed the decree with costs.

On a subsequent day Mr. *Lee* stated to the Court, that, since the hear-

(a) For the rest of the statement of this case, the reporter is indebted to the kindness of Mr. *Lee*.

ing of the appeal, he had ascertained that there were certain cases decided by Lord *Cottenham*, but not reported, which shewed that his Lordship would not have considered the present case within his decisions in *Taster v. Small*, and *Wood v. White*; and he, Mr. *Lee*, accordingly applied for a further argument of the appeal, which, notwithstanding the opposition of the counsel for the other parties, the Lord Chancellor granted.

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Upon the rehearing of the appeal, the plaintiff's counsel cited the two cases which had been referred to, viz. *Spence v. Hogg* (see *infra*), and *Collett v. Hover* (post, p. 227), and also *Daniels v. Davison*, 16 Ves. 249, 17 Ves. 433.

The LORD CHANCELLOR, without hearing the counsel for the other parties, said, that he saw no reason for altering the decree, and gave the defendants their costs.

Mr. *Lee* afterwards moved, by leave of the Court, that Vickers might be continued as a defendant on the record; urging, that, as Vickers might claim the difference between the plaintiff's purchase-money and what he, Vickers, had agreed to give to Thodey, it would be convenient, and prevent litigation, to keep him before the Court until the final decision of the cause.

Mr. *Rasch*, for Vickers, consented.

Mr. *Wood* contra.

The LORD CHANCELLOR refused the motion, observing, that the order applied for might increase litigation; and he gave costs to Thodey.

SPENCE v. JOSEPH HOGG, WILLIAM HOGG, and RALPH WILSON (a).

THE bill stated a contract by letter for the purchase, by the plaintiff, (through his agent Christian), of the defendants, the Hogg, of a house and other property, at Middleton, in the county of York; that the property was afterwards advertized for sale by public auction at an inn at Middleton; that Christian attended at the place of sale, and, previously to the property being put up for sale, publicly and repeatedly declared, in the presence of the Hogg and the other persons then pre-

(a) The reporter has drawn up the statement of this and the following case from the briefs in the causes.

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sent, that he had purchased the house and premises for the sum of £120; and that he held in his hand documents (*viz.* the letters) which were evidence of such contract; and that he, in the presence and with the knowledge of the Hoggs, deposited the £120 in the hands of the innkeeper, and publicly declared, that, if after that notice any one should purchase the property, he would file a bill in Chancery against both buyer and seller. The bill further stated, that the defendant Wilson, and his solicitor Mr. Dinsdale, were present at the sale, and heard the declarations of Christian, and that Dinsdale saw the letters. That, nevertheless, the premises were put up for sale and bought in, and were afterwards sold to the defendant Wilson by private contract.

The bill prayed specific performance of the agreement entered into with Christian, and for a conveyance of the premises to the plaintiff; and that, if necessary, the defendant Ralph Wilson might be ordered to join in the conveyance.

The defendant Wilson, by his answer, admitted that he was present at a sale of a house and premises at Middleton on the day mentioned in the bill, and that on the evening of the same day he purchased, by private contract, the premises which were the subject of the suit; but he insisted that the premises put up for sale were not those which he purchased, they being differently described in the advertisement. [There was a slight error in the description in the advertisement.] He denied having heard the declaration of Christian, though he believed he was present at the sale; but he admitted that certain letters were shewn by Christian to Dinsdale at the sale, and that Dinsdale was his solicitor.

The contract and the other material circumstances stated in the bill were proved by Christian (*a*). His evidence as to what took place at the sale was corroborated by other witnesses.

The cause came on for hearing before the *Vice-Chancellor of England*, in February, 1836, when his Honor decreed, that the agreement between the plaintiff and the defendants, the Hoggs, should be specifically performed, and the plaintiff be let into possession of the premises.

Upon appeal, by the defendant Wilson, to Lord *Cottenham*, C., his Lordship affirmed the Vice-Chancellor's decision, with costs, to be paid by the appellant.

Mr. Wigram and *Mr. Geldart*, for the plaintiff.

Mr. Temple and *Mr. Parker*, for the defendants.

(*a*) His evidence was objected to, but the objection was overruled by the Court.

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IN 1825, Octavius Ryland, being entitled under his father and mother's marriage settlement to a reversionary eleventh share in £2292 Consols, defeasible by the joint appointment of the settlors, took the benefit of the Insolvent Debtors Act. The share in the Consols was not mentioned in the schedule filed by the insolvent. Amongst the creditors named in the schedule was Edward Woollams for £500 for the purchase of an annuity of £40, charged upon certain property which was insufficient to satisfy the arrears. In 1831, Ryland again took the benefit of the Insolvent Act. Woollams afterwards died, leaving Susannah Woollams his executrix. In 1832, the father of the insolvent died without having executed a joint appointment.

In October, 1833, Benjamin Lewis, as trustee and solicitor for Ryland, entered into an agreement in writing with Susannah Woollams for the purchase of the annuity and all arrears at the price of £450; the consideration-money to be paid on or before the 22nd day of November then next ensuing. About the same time, Thomas Woodley, having by himself or his attorney (who was the same Benjamin Lewis) notice of all the circumstances relating to Ryland's insolvency, purchased for about £800 Ryland's reversionary eleventh share in the Consols. Out of the purchase-money, Lewis compounded at various sums with the creditors under the two insolvencies of Ryland, except Susannah Woollams, and procured from them a general release of their claims. The purchase by Woodley was completed by indenture of assignment, dated in January, 1834, but no notice of the assignment was given to the trustees of the settlement. In July of the same year, Susannah Woollams, having been unable to obtain from Lewis the completion of the contract of October, 1833, procured an order from the Insolvent Court, by which she was appointed assignee under the insolvency of 1825. In August, she served notice upon Lewis, that she abandoned the contract. In the following December, she, as assignee under the Insolvent Act, put up the reversionary interest in the Consols for sale at Garraways, when the plaintiff John Collett, without notice of the previous sale to Woodley, became the purchaser and signed an agreement for purchase, dated the 10th December, 1834, pursuant to the conditions of sale.

On the 5th February, 1835, Lewis, as the solicitor of Woodley, gave notice to the plaintiff of the agreement of October, 1833, for the purchase of the annuity, and of the assignment to Woodley of the reversionary share in the Consols; stating in such notice, that, if the plaintiff paid to the assignee under the Insolvent Debtors Act any purchase-money in respect of the same reversionary interest, a bill in equity would be filed against him.

In March, 1835, the plaintiff filed his bill against Susannah Woollams, Thomas Woodley, and Benjamin Lewis, praying, that the agreement of the 10th December, 1834, might be specifically performed; that it might be referred to the Master to inquire, whether the defendant Wool-

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lams could make a good title, and had power to convey to the plaintiff and that the rights and interests of the defendants Woodley and Lewis in the purchase-money payable by the plaintiff, claimed by them under the notice of the 5th February, 1835, might be ascertained.

Susannah Woollams afterwards married Hover, who was brought before the Court by supplemental bill.

The cause came on for hearing before Lord *Cottenham*, C., on the 23rd February, 1839, when his Lordship decreed, that the agreement of the 10th December, 1834, should be specifically performed; that the defendant, the assignee, should execute to the plaintiff a proper assignment of the reversionary sum of stock comprised in the agreement; and that the defendants Woodley and Lewis should pay the costs of the suit.

May 29th.

MORGAN v. MORGAN.

After a lapse of several months since the service of the subpoena to appear and answer, the Court will not allow the plaintiff a strict order to enter an appearance for the defendant, but will either give him a qualified order for that purpose, or put him to serve notice on the defendant.

MR. WETHERELL moved to enter an appearance for the defendant under the 8th order of August, 1841, calling The *Vice-Chancellor's* attention to the date of the *subpoena* which was served on the 8th January, 1844.

There was no affidavit to shew why the motion was not made at an earlier period.

The VICE-CHANCELLOR said he was not sorry to be informed of any circumstance which might justify him in relaxing the 8th order; and on account of the unexplained delay which had taken place, he should not grant the application in the terms asked; but he gave the plaintiffs an option of taking an order similar to that mentioned in *Husham v. Dixon* (a), (viz. that the plaintiffs should be at liberty to enter an appearance at the end of ten days, undertaking, in the meantime, to serve the defendant with a copy of the order made on the present motion within six days, unless the defendant should have appeared in the meantime), or else of giving notice to the defendant, as was ordered in *Radford v. Roberts* (b).

(a) 1 Y. & C. C. C. 203. The practice introduced by this case was in the first instance disapproved by the *Lord Chancellor*,

(see 1 Y. & C. C. C. 552), but has since been restored.

(b) 2 Hare, 96.

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May 30/h.

PERRY v. WALKER.

THIS was a motion by the defendant to discharge two orders, bearing date respectively the 18th August, 1836, and the 21st June, 1842, and made respectively in the original and supplemental suits, whereby the plaintiff had been admitted to sue *in formâ pauperis*. Both those orders had been obtained upon affidavits that the plaintiff was not worth the sum of £5 in all the world, his *just debts being first paid*; his wearing apparel, and the matters in question in the cause, only excepted.

The application was made on two grounds: first, the vexatious conduct of the plaintiff; and secondly, the state of his circumstances, which were alleged to be so far good that he could not, consistently with the practice of the Court, be allowed to prosecute the cause as a pauper.

In support of the first ground, the affidavit of the clerk of the defendant's solicitor was read; from which it appeared that four motions by the plaintiff had been made for precisely the same purpose, namely, for the deposit of deeds and documents with an officer of the Court, and had been refused; that two other motions had been substantially refused, and another expressly refused on the ground that the notice had not been signed by a solicitor. These motions were made prior to the 1st July, 1842, on which day a motion for dispaupering the plaintiff on other grounds had been made and refused (a). It further appeared from the affidavits, that, subsequently to that date, and subsequently to the decree in the cause, (by which certain accounts were directed, and certain deeds and documents were ordered to be produced), five affidavits, three of which related to books and papers in the possession of the plaintiff or his agents, having been left by the plaintiff in the Master's office, were by the Master declared to be insufficient; that one petition

A plaintiff suing in formâ pauperis, carrying on a considerable business, and having the possession of property greater in amount than £5, though not after payment of his just debts, dispaupered.

The affidavit as to property, filed in support of an application to be allowed to sue in formâ pauperis, ought to except nothing but the wearing apparel and the matters in question in the cause.

Semble, that a pauper plaintiff or defendant may be dispaupered for vexatious conduct in the suit.

(a) See 1 Y. & C. C. C. 676.

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by the plaintiff, containing 61 folios, which had come on for hearing, had not been heard by the Court for want of the signature of a solicitor; and that of two other petitions relating to the same subject, and each containing respectively 123 folios, one was withdrawn after counsel had been instructed by the defendant, and the other had been dismissed, except that, as to part, an order had been made by consent.

The affidavit further stated that the defendant had been put to the expense of above £100 in opposing these several motions and petitions; and the deponent believed, that, if the plaintiff had acted under the advice of counsel or solicitors, some of these proceedings would not have been had.

Mr. *Cooper* and Mr. *Wright*, for the defendant, upon the first ground of application, referred to 1 *Dan. Ch. Pr. 44*, and *Wagner v. Mears* (a), contending that the last-mentioned case must have been decided on the ground of vexatious conduct on the part of the plaintiffs.

The *Vice-Chancellor*, in the course of the argument, said, that it seemed, from the report of *Wagner v. Mears*, that the plaintiff in that case did not appear upon the motion to dispauper; he also observed that the grounds of the judgment of the *Vice-Chancellor of England* were not stated. His Honor, however, said that he did not dispute the general proposition, that a pauper might so improperly conduct himself in a cause as to render it right to dispauper him.

The VICE-CHANCELLOR.—I am of opinion, that, on the ground of vexation, a sufficient case is not made for dispaupering the plaintiff. An application was made to me to dispauper him in the year 1842, and, upon the grounds then laid before me, I thought a sufficient case for dis—

(a) 3 Sim. 127.

paupering him not made. I understand that there has never been any appeal from the order which I then made, declining to dispauper him. Now the grounds, at present suggested, of vexation, were either then made or were not then made. If they were then made, I have decided upon them; if they were not then brought forward, I think they ought to have been brought forward; I cannot hear it now stated, as a ground for dispaupering the party, that there was vexation which was not upon that occasion brought forward; and if I could, I must still recollect, that, if there was vexatious conduct under professional advice, the pauper may perhaps not be personally censurable for that; and if there was vexatious conduct not under professional advice, then the party opposed to the pauper has been, to a great extent, the cause of it himself, inasmuch as he did not claim the protection of the Court against applications made without professional sanction. For these reasons, I certainly, with regard to vexatious conduct, must decline going back beyond the order that I made in 1842, refusing to dispauper him. My observations, however, are not meant to relate to vexatious conduct, if any, since.

The defendant's counsel then, with the permission of the *Vice-Chancellor*, addressed the Court on the subject of the vexatious conduct which took place after the 1st of July, 1842. His Honor, however, came to the conclusion that this part of the case was not sufficient to sustain the motion for dispaupering.

In support of the second ground of the application, the affidavit of the defendant's solicitor's clerk was read, stating, in substance, the following facts:—that, by an indenture of assignment, bearing date the 16th December, 1839, two houses, Nos. 2 and 3, York-street, Westminster, had been assigned to the plaintiff for the residue then to come of a

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term of thirty-one years granted by an indenture of lease, dated the 22nd August, 1822; that, from inquiries made by the defendant in 1844, he had ascertained that the plaintiff was still in possession of those premises, that the rent received by him for the same, from various persons, amounted to £79 a year, besides the value of a portion of the premises occupied by himself, and that he had paid the rates and taxes; that he had been employed to a considerable extent in, and was still carrying on, his trade of a builder and carpenter, and that in one instance his bill amounted to £100; and that, for several months in the year 1843, he had employed a person as his foreman, whom he boarded, and to whom he paid two guineas a week; that, sometime in March, 1840, he became surety to a loan society for the re-payment of ten guineas advanced by the society to an individual.

In reply to this statement, affidavits on behalf of the plaintiff were read, from which it appeared that the purchase-money, paid by him for the premises in York-street, had been borrowed, and that, for securing re-payment, the title-deeds of the property had been deposited with the creditor; but that the debt had been afterwards paid off, partly by small sums paid by the defendant to the creditor, partly by a bill of exchange taken by the creditor from the plaintiff, and partly by monies, amounting to £100, borrowed of a third person, as a security for which the title-deeds of the property were deposited with that person. The plaintiff then stated in his affidavit, that this sum of £100 was afterwards reduced by him to £92, which was still owing; and that, in addition to the monies owing in respect of this property, he, the plaintiff, owed upwards of £300. He admitted that his bills had been considerable, but stated that he had always been paid small sums on account, and that he had been from time to time in great distress for money, and sometimes in want of the necessities of

life, (as to which particulars were stated); and that, the matters in this suit only excepted, if all that he, the plaintiff, had in the world, not excepting the wearing apparel of himself, his wife and children, were sold, he would then be upwards of £200 in debt; and that “he is not worth £5 in all the world, his just debts being first paid, his wearing apparel, and the matters in question in the cause, only excepted.”

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Mr. *Cooper* and Mr. *Wright*, in support of the motion.—The question now before the Court is, whether a person, who, although he may in the course of the year be considerably embarrassed, yet, in fact, is in the receipt of a considerable income, is entitled to the benefit of the stat. 11 *Hen.* 7, c. 12. That statute, which is the foundation of the practice in respect to paupers, does not fix the amount of poverty which shall enable a man to sue as a pauper, but enacts that the poor persons, there described, shall have writs at the *discretion* of the Chancellor. The practice may have varied, but it is founded on that statute. At the Rolls the affidavit appears to have been generally, and now always is, that A. B. is not worth £5 in all the world, there being no exception of debts. [The *Vice-Chancellor*.—I understand, upon high authority, that the practice at the Rolls is considered settled, not to allow the exception of the debts; the order to sue or to defend *in form pauperis* being made on an affidavit as to property which excepts nothing but the wearing apparel, and the matters in question in the cause] (*a*). If a man is in possession of property which is encumbered to an amount more than the value, that, it is apprehended, is not a reason why he should be entitled to the benefit of the act: Deaves's *M. S. S.*, Prac. Reg. 268, 1st ed.; Wy. Prac. Reg. 321;

(*a*) See 1 Smith. Ch. Pr. 707.

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Tunstall v. Freeney (a), *Bartlett v. Smith* (b), *Clarke v. Pyke* (c), *Baver v. Baver* (d). They also referred to the cases cited in *Perry v. Walker* (e).

In the course of the preceding argument, the *Vice-Chancellor* said, that he could not, in an unqualified manner, adopt the observation attributed to him in the report of this case, in 1 Y. & C. C. C. 679, commencing "In order to dispauper a man, &c." That observation must either be restricted, or considered with reference to the context.

Mr. *Southgate*, for the plaintiff.—The statement as to the practice at the Rolls is matter of surprise. In *Duke v. Tovey* (f), the exception as to the debts appears to have

(a) *Tunstall v. Freeney*, Rolls, 19th May, 1702.—"Motion by the defendant, alleging, that the plaintiff is seised of an estate of inheritance of 40s. annual value, and hath been in possession thereof twenty years, and that he hath household furniture to the value of £10, (all which by affidavit appears), and praying plaintiff may be dispaupered; which is ordered accordingly."

(b) *Bartlett v. Smith*, Rolls, 8th November, 1705.—"Motion by defendant in the presence of counsel for the plaintiff, alleging, that plaintiff has procured himself to be admitted to prosecute this suit *in formâ pauperis*, whereas he is a man under very good circumstances, and follows the employment of a doctor for the cure of ruptures and other things mentioned in printed bills by him given out, and in that employment gets a good living, and keeps a house of £20 per annum

in Goodman's-fields, and another apartment near Fleet-bridge, of £11 per annum, for the exercise of his profession, and hath good lodgings at Greenwich, and, according to the way of living, doth not spend less than £100 per annum, as by affidavits appear. It was prayed, that the plaintiff might be dispaupered. Whereupon, and upon hearing several affidavits on both sides, the Court doth think fit and so order, that the plaintiff be dispaupered."

(c) *Clarke v. Pyke*, Rolls, 24th June, 1706.—"Motion by defendant, alleging the plaintiff to be suing *in formâ pauperis*, when he is a housekeeper in the parish of St. Andrew, Holborn, and pays £2~~5~~ per annum house-rent, and the furniture in house worth £40. Order nisi to dispauper granted."

(d) Rolls, 1700.

(e) 1 Y. & C. C. C. 677.

(f) *Id.*, in *notis*.

been permitted; but the point, it is conceived, is not of the greatest importance. The act of parliament is altogether silent as to the manner in which the Court is to decide who is a poor person and who is not. The question to be tried is, not whether the man can command £5 either after payment or non-payment of his debts; but whether he is a poor person within the meaning of the statute. The means by which you try that is, by inquiring what he is worth. No doubt, it is not a matter of course to except the debts; but, neither is the reverse a matter of course, unless by modern practice. It is a question of circumstances. In some cases it might operate great injustice and inconvenience to except them; in others not to except them might have an equally bad effect. The question is, whether the plaintiff is or is not prevented by his poverty from proceeding with the suit otherwise than *in forma pauperis*. The matter rests entirely in the discretion of the Court.

The VICE-CHANCELLOR.—The Court has laid down certain technical rules for ascertaining the sort of persons that ought to be considered as coming within the description of poor persons, entitled to the benefit of suing or defending under certain exemptions. I cannot exercise a general discretion on the subject, not restricted by that course of practice. Considering the course that has been pursued for many years, it is impossible for me, at the present day, to think that Mr. Perry is a person entitled to the benefit of that exemption. His circumstances seem considerably depressed. It is creditable to him, certainly, to endeavour to support himself and his family by his labour, rather than be dependent upon other assistance. The case, however, does not turn merely upon that. If it did, I should doubt very much whether the extent and character of the operations of Mr. Perry, as a tradesman, are not such as to go beyond

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a degree of employment, properly consistent with the character of a poor person, entitled to the exemption that I have mentioned. I do not, however, decide this motion upon that ground merely; I decide it mainly, though not solely, on the ground of the property in the houses in York-street, which it appears he holds for a term, of which more than nine years are unexpired. That property, the ground-rent of which I cannot take to exceed £50 a year, if it amounts to so much, (there is no proof that it amounts to so much), appears to produce an annual rent of £79, independently of the value of that portion of it which is occupied by himself. It is stated that this is under mortgage. It appears, however, that, while he was in the situation of a poor person in this very suit, he acquired this property in his own name. The money, it is true, as it is deposed, was lent to him; but that debt he has paid off, either wholly, or through the acceptance by the original creditor of his personal security for part of it. The deeds, it is said, are not now in his possession, inasmuch as he has deposited them, by way of equitable mortgage, with some other person, whose name, however, is not mentioned. It is remarkable that the name of that person has not been mentioned; and I think that more information on the subject ought to have been given by Mr. Perry than has been given, if it were considered material to depreciate the value of this property, with a view to the present question. Under these circumstances, relying chiefly on the extent of property that he has in this house, and partly also, though not mainly, upon the manner in which he has been employing himself, and the extent to which, and the character in which, he has been earning money, I am of opinion, that, consistently with the rules and practice of this Court, he is not in a situation to sue as a pauper, and therefore he must be dispaupered.

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MILBANK v. COLLIER.

June 6th.

JOHN CLIFF, by his will, dated the 13th July, 1832, after devising various real estates to different persons, gave and devised all the rest and residue of his real estate unto and to the use of John Ricketts, Stephen Collier, and William Stevens, and their heirs, upon trust, during the life of his wife Hannah Cliff, to let the same as therein mentioned, and to apply a competent portion of the rents in repairs, &c.; and with, and out of, the rents which should arise from his said residuary real estate, after answering such purposes, to pay, satisfy, and discharge, in aid of his personal estate, so much of his debts, funeral and testamentary expenses and legacies, (except a certain legacy therein mentioned), as his residuary personal estate should be insufficient to pay and satisfy. And upon further trust, to lay out and invest the ultimate residue of the rents which, during the term of twenty-one years, to be computed from the time of his decease, (if his wife should so long live), should arise from his said reversionary real estate, and which should remain after answering the purposes aforesaid, in the names of them, the trustees, in the public funds, and receive the dividends and annual produce thereof, and lay out the same in any of the said funds, so as to accumulate during the said term, and, if his wife should live beyond that term, to pay her the dividends; with a declaration, that, after the death of his wife, the accumulations were to be subject to the trusts thereafter declared concerning the monies to arise from the sale of his residuary real estate. And the testator declared, that, after the decease of his said

Under the will of her husband a woman had a general power of appointment over a sum of £20,000 consols, which was to be raised and invested out of the husband's personal estate, and, in aid thereof, out of his realty. Upon the husband's death, a suit was instituted against the wife, as his executrix, and against the devisees in trust of his real estate (who had power to sign receipts) for the administration of his real and personal estate. Pending the suit the wife died, having by her will appointed to various persons the £20,000 consols, part only of which, by reason of the deficiency in the husband's personalty, had been appropriated and invested. Upon a bill filed against the wife's executors to revive the

administration suit:—*Held*, as to that part of the appointed fund which was invested and appropriated, that, supposing the object of the suit to be, to make it contributory to the husband's assets, the appointees were necessary parties; but, as to the remainder of the fund:—*Held*, that they were not necessary parties.

Where appointees are numerous, they may be represented, as defendants to a suit, by some on behalf of the rest.

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wife, the said trustees or trustee should stand and be possessed of all his said residuary real estate upon trust, with convenient speed, to sell and dispose of the same, either or in lots, &c. (in the usual form), and should and be possessed of and interested in the monies from such sale upon trust, for the children of E Milbank and other persons named in the will; and that, if the rents and profits, which during the life of his wife were made applicable to the payment of his debts, were not sufficient for that purpose, the deficiency should be made good out of the monies arising from the sale of his residuary real estate.

The testator then, after bequeathing certain real estate, gave and bequeathed to the same trustees, their executors and assigns, such a sum of money as would produce £20,000 cent. consols, upon trust, to invest the same in the said consols, and pay the dividends to his said wife for her life; and provided, that, in case such dividends should not, by reason of any reduction of the rate of interest, &c., prove sufficient to produce and realize to his said wife a clear annual income of £600 per annum, the deficiency was to be made up by his trustees, until the end of twenty-one years after his decease out of the rents and profits of his freehold estates, which were in his said will directed to accumulate during that period, and which said freehold estates he charged with the payment of such deficiency according to the direction of his said will. And, after the decease of his said wife, he directed, that the said trustees should stand and be possessed of the said £20,000 consols, upon such trusts and for such purposes as his said wife, whether sole or covert, should direct in her last will and testament, or any codicil to be made by her, and attested as therein mentioned, direct or appointed; and in default of such direction or appointment, upon the trusts thereinbefore expressed and contained concerning the said monies to arise from the sale of his said real estate.

The testator then, after giving various legacies, directed

that the income of his residuary personal estate during his wife's life, and the capital of it at her death, should, subject to the payment of his debts, &c., be applied in the same manner as the income of the residuary real estate during her life, and the monies arising from the sale of it at her death. He then appointed his wife and the trustees to be executors of his will, and declared, that the receipt or receipts of his trustees or trustee for the time being, to whom any money should be payable under his will, for any money which should be so paid to them, him, or her, should effectually discharge the person or persons paying the same from being answerable or accountable for the misapplication or non-application thereof, or to inquire into the necessity or propriety of any sale that might be made by virtue of his will.

By a codicil, dated the 9th November, 1833, the testator, after reciting the bequest of £20,000 consols, and that, in consequence of several purchases, and other advances of money which he had had occasion to make, he was not certain whether a sufficient sum would be left out of his personal estate to satisfy and complete such investment for his said wife, as aforesaid, authorized and empowered his said trustees and executors, if in their discretion they should see fit and necessary so to do, to raise, by mortgage of such part or parts of his real estate not specifically devised, as they might judge best, such a sum of money as might prove necessary, in their discretion, to complete the said investment for his said wife; and he declared, that the receipt or receipts of his said trustees should be a sufficient discharge to any mortgagee or mortgagees who might advance the same, and that such mortgagee or mortgagees should not be required to see to the application, or be in anywise affected by the non-application, of the money so advanced, or any part thereof.

Upon the death of the testator, his will was proved by Collier and Stevens, and they entered into the possession of the real estates.

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wife, the said trustees or trustee should stand and of all his said residuary real estate upon trust, with convenient speed, to sell and dispose of the same, either or in lots, &c. (in the usual form), and should and be possessed of and interested in the monies from such sale upon trust, for the children of Milbank and other persons named in the will; that, if the rents and profits, which during the life of his said wife were made applicable to the payment of his debts, were not sufficient for that purpose, the deficiency should be made good out of the monies arising from the sale of his residuary real estate.

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The testator then, after giving various legacies,

that the income of his residuary personal estate during his wife's life, and the capital of it at her death, should, subject to the payment of his debts, &c., be applied in the same manner as the income of the residuary real estate during her life, and the monies arising from the sale of it at her death. He then appointed his wife and the trustees to be executors of his will, and declared, that the receipt or receipts of his trustees or trustee for the time being, to whom any money should be payable under his will, for any money which should be so paid to them, him, or her, should effectually discharge the person or persons paying the same from being answerable or accountable for the misapplication or non-application thereof, or to inquire into the necessity or propriety of any sale that might be made by virtue of his will.

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In 1833, a bill was filed by the residuary legatees against Hannah Cliff, Collier, and Stevens, charging, that Hannah Cliff had acted as executrix, and that, with her cognizance the other defendants had committed divers breaches of trust in the management of the estate, for which all the defendants were responsible; and praying the usual accounts of the personal estate, accounts of the rents and profits of the real estate, with charges for wilful default and also accounts of the profits made, and losses incurred in the management of the real estate.

The cause came on for hearing before *Knight Bruce* V. C., in July, 1842, when his Honor directed preliminary inquiries to be made before the Master, as to the next of kin, heir-at-law, &c., of the testator.

Pending these inquiries in the Master's Office, Hannah Cliff died, having by her will, made in pursuance of the power given to her, bequeathed the £20,000 consols to thirty-seven persons, two of whom, viz., the before-named Stephen Collier and Thomas Waters, she appointed executors of her will jointly with William May.

In consequence of the death of Hannah Cliff, a bill of revivor was filed against her executors, in which was included a prayer, that the defendants might either admit assets to their testatrix, sufficient to answer what should be found due from her to the estate of the testator, John Cliff, or that the usual accounts might be taken of her personal estate.

The defendant Collier, by his answers, stated, that the personal estate of the testator was insufficient to answer the legacy of £20,000 consols, and that a large portion thereof would have to be raised out of the real estate; and regarding being had to that fact, he submitted to the Court, whether or not the appointees under Mrs. Cliff's will ought to be made parties to the suit (a).

(a) Where a cause is set down for hearing, upon the defendant's objection for want of parties under the 39th order, August, 1841, &c.

The cause now came on for hearing, upon the objection of the defendant Collier for want of parties.

It was stated at the bar, that the executors of Cliff had raised and set apart £10,000 stock out of his personal estate, of which Mrs. Cliff received the dividends during her life; the receiver in the cause paying her an annual sum as for interest on the remaining £10,000 stock.

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Mr. *Spence* and Mr. *Elmsley*, for the plaintiffs.

Mr. *Simpkinson* and Mr. *Bagshawe*, for the defendant Collier, contended, that Mrs. Cliff's appointees were necessary parties to the suit.

Upon the question, whether the real estate of John Cliff, which was charged with the payment of the £20,000 consols, in aid of this personalty, was properly represented by the trustees alone, reference was made to the 30th Order of August, 1841.

The VICE-CHANCELLOR.—So far as this legacy has not been satisfied by appropriation or otherwise, I think these parties not necessary. The suit is instituted for the general administration of the real and personal estate of the testator Mr. Cliff. He gives his real estate to trustees upon trust to sell. He vests in them the power of giving receipts. Among other bequests is this £20,000 stock, which is charged upon his personal estate by the codicil, if not by the will, and also charged upon the real estate by the will. This legacy is given to his wife for life, and, after her decease, as she shall appoint by will, and, in default of appointment, to other persons who are before the Court.

If there were nothing more than this, I should think

Court will assume, for the purpose of deciding that objection only, the defendant's answer to be true. *Ri-* *chardson v. Larpent*, 2 Y. & C. C. C. 507.

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the case clear. Mrs. Cliff, however, dies pending the suit. A bill of revivor is filed, and accounts are sought against her executors. The absence of the necessity of making any party interested in the £20,000 stock a party to the suit remains. The parties so interested may come in and claim as other legatees. So far, therefore, as this is considered an unsatisfied legacy, they are not necessary parties.

But, upon the question whether, supposing the legacy to have been to a certain extent satisfied by appropriation, and that appropriation to exist in the shape of a fund in Court, and an object of the suit to be to make that fund contributory, it is not in that respect necessary to make these persons parties, I will hear the defendants' counsel.

Mr. *Simpkinson* then contended, that it was necessary, according to the practice of the Court, to make the appointees of the appropriated fund parties.

At the conclusion of the argument, it was observed by the plaintiffs' counsel that two of the defendants, who were before the Court as executors of the wife, were appointees.

The VICE-CHANCELLOR directed that the bill should be amended by stating that there were thirty-seven appointees, and that two of the executors were two of the appointees.

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GALTON v. EMUSS.

June 8th.

IN the year 1838, a farm and estate at Oddingley, in the county of Worcester, belonging to one Mr. Williams, were advertised to be sold by public auction on the 23rd of November, 1838. The estate adjoined property of the plaintiff, and also a farm and estate of John Nash; and both the plaintiff and John Nash, being desirous of purchasing the estate, entered into and signed the following agreement:—

“Memorandum. In consideration of Mr. Galton not opposing the undersigned John Nash in the purchase by auction of Mr. Williams’s estate at Oddingley, now advertised for sale, Mr. Nash engages that he will not sell such estate, (in case he purchases), or the farm of which he is the owner at present at Oddingley aforesaid, to any person, until he has given Mr. Galton the offer thereof, at such price as he may purchase the same for, together with all necessary expenses to be laid out in repairs in the meantime, as far as regards Mr. Williams’s farm, and, as far as regards Mr. Nash’s own farm, at the same price per acre (the timber being paid for in addition) as he may purchase Mr. Williams’s for; and the timber on Mr. Williams’s to be paid for or not, according as Mr. Nash may purchase Mr. Williams’s estate, either by having the timber included in the price, or by paying for it at a valuation. And Mr. Nash engages, in case he purchases Mr. Williams’s estate, that Mr. Galton or his heir-at-law shall in any case have the offer, for twelve months, of both the estates above mentioned upon the terms aforesaid, by the trustees under the will of the said John Nash, to whom he will give ample powers for the purpose.”

The plaintiff, in pursuance of this agreement, made no opposition to Nash, who accordingly became the purchaser of the estate, inclusive of the timber thereon, for the sum of £4,900. Previously to the date of the above agreement,

An agreement between two persons, who are desirous of purchasing an estate advertised for sale by auction, that one of them shall not bid against the other, is not illegal.

A. and B. agree, that, in consideration of A.’s withdrawing his opposition to B.’s purchase of an estate at a sale by auction, A. shall have the right of pre-emption of that estate and of another estate belonging to B. during B’s lifetime, and for twelve months after his decease. The agreement is founded upon valuable consideration, and can be enforced against the devisees in trust and cestui que trusts under the will of B.

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John Nash made his will, dated the 22nd of October, 1830, and thereby gave and devised the estate or farm at Od-dingley, of which he is stated in the above agreement to have been the owner, unto John Emuss, Isaac Green, and Thomas Gale Curtler, and their heirs, to and upon the uses and trusts thereafter expressed and declared; that is to say, to the use, intent, and purpose that his sister, Elizabeth Smith, and her assigns should, during her life, receive an annuity of £50 thereout; and, subject thereto, to the use of the testator's nephew, Thomas Grove Smith, and his assigns, during his life, with remainder to the use of the said trustees and their heirs during the life of his said nephew, in trust to preserve the contingent remainders; with remainder to the use of all and every such of the sons and daughters of the said Thomas Grove Smith who should be living at his decease, and the lawful issue of such of them as might have died in his lifetime leaving issue, equally to be divided amongst them, if more than one, share and share alike, as tenants in common, and their respective heirs and assigns, &c.; with like limitations over to other nephews of the testator and their issue, with an ultimate limitation to the use of the testator's right heirs.

By a codicil, made after the purchase of Williams' estate, and dated the 22nd of August, 1839, Nash gave and devised that estate to the same trustees and their heir to the use of his five nephews and nieces, therein named and their issue in five equal fifth parts; the limitation of each fifth part being similar to the limitations in his will as to the other estate. No power of sale was given to trustees by the will or codicil as to any portion of the testator's estates. The trustees were appointed executors.

John Nash died on the 19th of March, 1841, without having revoked his will or codicil, which were accordingly proved by the executors.

No offer for the sale of the estates to the plaintiff ever made by Nash in his lifetime, or by the trustees

wards, and the plaintiff, on the 7th of March, 1842, gave notice to the trustees and the persons beneficially interested under the will, of his intention to purchase both the estates under the terms of the agreement of the 20th of November, 1838. Upon the trustees declining to sell without the direction of the Court, the plaintiff filed the present bill against the trustees and the persons beneficially entitled to the estates under John Nash's will, for the purpose of enforcing specific performance of the contract.

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Mr. Russell and *Mr. Amphlett*, for the plaintiff.

Mr. Geldart, for the defendants the trustees.

Mr. Wigram and *Mr. Hubback*, for the defendant Thomas Grove Smith.—This case is one of considerable hardship to the defendant, and that alone is a sufficient ground to induce the Court to withhold from the plaintiff the relief which he seeks, and the granting of which is entirely at the discretion of the Court: *Faine v. Brown* (a), ——— *v. White* (b), *Howell v. George* (c). To entitle him to a decree for specific performance, the plaintiff should come into Court with perfect propriety of conduct. He has, however, entered into this contract behind the back of the vendor, has kept it for years a secret, and now comes forward to enforce it against parties who were entirely ignorant of it. In underhand transactions of this kind, the Court will not enforce specific performance: *Twinning v. Morrice* (d), *Phillips v. Duke of Buckingham* (e), *Fellows v. Lord Gwydyr* (f). Supposing the Court to decree specific performance, will an interest in the purchase-

(a) 2 Vez. sen. 307, cited.

(b) 3 Swanst. 108, n.

(c) 1 Madd. 1.

(d) 2 Bro. C. C. 326.

(e) 1 Vern. 227.

(f) 1 Sim. 63.

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money be secured to the defendant equivalent to his interest in the land?—[The *Vice-Chancellor* referred to *Drant v. Vause* (a).]

Mr. *Parry*, Mr. *Cameron*, and Mr. *Towry White* appeared for other defendants beneficially interested in the estates.

The *Vice-Chancellor* suggested, that it might possibly be considered desirable by the defendants to take a case for the opinion of a court of law as to the legality of the contract. The defendants' counsel, however, did not intimate any wish to do so.

THE VICE-CHANCELLOR.—Two men, severally desirous of effecting a purchase of an estate, become acquainted with each other's intentions, and, with a view to their own benefit, enter into an engagement together that one shall retire, leaving the field open to the other. It is not suggested that this arrangement involved any matter of fraud or misrepresentation; it was merely, that one should not bid while the other was a competitor. No authority has been cited to shew that a contract founded on such a consideration is illegal, and, as the defendants have not, in consequence of my intimation, or otherwise, asked for an opportunity of bringing the question before a Court of law, I assume that it is not their wish to do so. In the absence of authority to prove the present contract illegal, and of any such application, I must hold the contract to be legal, and founded on valuable consideration; and I see no case of hardship to prevent it from being carried into effect by a Court of equity.

ALL parties informing the Court that all persons interested in the estate devised by the will of John Nash are before the Court, Declare, that the agreement of the 20th of November, 1838, ought to be specifically

(a) 1 Y. & C. C. C. 580.

performed. Declare, that, for the purposes of the said agreement, the whole of the sum of £4950, being the price given by the testator John Nash for the farm purchased of Mr. Williams, with the timber included, as in the pleading mentioned, is to be treated and considered as a price at so much per acre. Inquire whether a good title can be made to the farms at Oddingley according to the said agreement. Inquire what is due for the purchase-money of the said farms, and the timber thereon, under the said agreement; and let this inquiry be without prejudice to any question as to the title. All parties waiving any inquiry as to the rents and profits prior to the 29th of March, 1842, let the Master inquire by whom the rents and profits of the said estates have been received from that time. Reserve further directions and costs, with liberty to apply.

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EDWARDS v. JONES.

June 11th.

BY an indenture of demise, dated the 1st January, 1835, Lord Newborough demised to Robert Jones, his executors, administrators, and assigns, a piece of land called Caer Llwrđ, situate near the town of Caernarvon, for the term of sixty years, at an annual rent of £10, for the purpose of erecting buildings thereon.

Mortgagee of leaseholds, held for a term of years, joined with the mortgagor in leasing part of the property to A. B. for the residue of the term, at a rent of £3 per annum, payable to the mortgagor, his executors, administrators, and assigns. The lease contained a clause reserving the right of re-entry, in case of non-payment of rent, to the mortgagor, his executors, administrators, or assigns.

By an indenture of the 12th September, 1835, Robert Jones assigned the premises to Brisco Owen, for the residue of the term, by way of mortgage, to secure £400; and by an indenture of the 19th November, 1836, Owen, in consideration of the plaintiff paying off his mortgage, assigned the premises to the plaintiff, who, at the same time, advanced a further sum to Robert Jones, making the whole amount secured by mortgage £1000 and interest. By this deed, to which the mortgagor was a party, power was given to the mortgagee, upon default of payment of the mortgage-

There was also a declaration that nothing therein contained should be construed to defeat, impeach, or determine the estate of the mortgagee under the mortgage deed, so far as the same affected the entirety of the premises. After the execution of the deed, the mortgagor became bankrupt:—*Held*, that A. B. was entitled to the benefit of this lease, exempt from the mortgage, but that the mortgagee, and not the assignee of the bankrupt mortgagor, was entitled to the rent of £3 per annum.

Defendant assignee of bankrupt, held, under the circumstances of the case, not entitled to receive his costs, though not liable to pay costs.

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money, and after two months' notice to the mortgagor, to sell the property, and, after satisfaction of the debt and costs, to pay the surplus of the proceeds of the sale to the mortgagor, his executors, administrators, or assigns.

By an indenture of lease, dated the 16th May, 1837, and made between Robert Jones of the first part, Lord Newborough of the second part, the plaintiff of the third part, and Robert Bodoan Griffith of the fourth part, after reciting the before-mentioned indentures, and that Robert Jones had, with the respective consents of the said Lord Newborough and the plaintiff, agreed to underlet unto the said R. B. Griffith the piece or parcel of land thereafter described, being part of the said leasehold premises, at the yearly rent of £3, for the term thereafter mentioned: It was witnessed, that, in pursuance of the said agreement, and as well for and in consideration of the expense which the said R. B. Griffith would be at in erecting and furnishing one good substantial dwelling-house, to be called Eldon Cottage, upon the piece or parcel of land and hereditaments thereafter described, as also for and in consideration of the yearly rent, payments, reservations, conditions, covenants, and agreements thereafter contained by and on the part and behalf of the said R. B. Griffith, his executors, administrators, or assigns, to be kept, done, observed, and performed, he the said R. Jones demised, leased, set and let, and each of them the said Lord Newborough and the plaintiff approved, ratified, and confirmed unto the said R. B. Griffith, his executors, administrators, and assigns, all that piece or parcel of land, being part of the field or piece of ground called Caer Llwrđ, with the dwelling-house to be erected thereon, &c., to hold the same unto the said R. B. Griffith, his executors, administrators, and assigns, from the said 16th May, 1837, for and during all the rest, residue, and remainder of the said term of sixty years, yielding and paying therefore yearly &c. unto the said R. Jones, his executors, administrators, or assigns, the clear yearly rent

or sum of £3 sterling, free and clear of and from all taxes, rates, charges, and impositions whatsoever in each and every year, the first payment thereof to commence and be made on the 12th day of May then next ensuing. And the said R. B. Griffith did thereby, for himself, his executors, administrators, and assigns, covenant with the said R. Jones, his executors, administrators, and assigns, for the erection of a house as therein mentioned, and for payment unto the said R. Jones, his executors, administrators, and assigns, of the said yearly rent or sum of £3, and for the repairs of the premises thereby demised and the buildings to be erected thereon; and it was thereby provided, that, in default of payment of the said rent, or upon any assignment of the said premises by the said R. B. Griffith, except as therein mentioned, it should be lawful for the said R. Jones, his executors, administrators, or assigns, or any or either of them, into the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy as in his or their first and former estate or estates, anything thereinbefore contained to the contrary notwithstanding. And it was thereby provided, that the consent thereby given by the said Lord Newborough as aforesaid should not in anywise abridge, alter, determine, lessen, impeach, or prejudice the right of entry contained in the said recited indenture of lease by reason of the non-performance and fulfilment of all and every or any of the covenants, conditions, provisoes, and agreements contained in the same indenture of lease, and which thenceforth were or ought to be observed, performed, fulfilled, and kept by the said R. Jones, his executors, administrators, or assigns, for or in respect of the same premises demised to him and them by the same indenture of lease. And it was thereby lastly declared by all the said parties thereto, that nothing in the said indenture contained or expressed should tend to disqualify, abridge, lessen, alter, or be construed by any means whatsoever to extend, dis-

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seise, defeat, impeach, annul, or determine the estate, right, title, and interest in any respect of the plaintiff by virtue of the said recited indenture of mortgage, as far as the same affected the said leasehold hereditaments and premises demised in and by the said therein-recited indenture of lease, which then remained and stood charged with, and was to continue and remain a security to the plaintiff for, the said sum of £1000 and interest thereon, then remaining unsatisfied to the plaintiff.

In January, 1840, a fiat in bankruptcy issued against Robert Jones, under which he was declared a bankrupt, and William Jones was appointed assignee of his estate and effects.

In 1841, the plaintiff recovered the mortgaged premises by ejectment, and in 1843, she filed her bill of foreclosure against William Jones, the bankrupt Robert Jones being alleged to be out of the jurisdiction. This bill was afterwards amended by inserting a statement of the existence and execution of the lease of the 16th May, 1837, and by making R. B. Griffith a defendant.

The amended bill alleged, that R. B. Griffith, in respect of his interest in part of the premises under the indenture of the 16th May, 1837, claimed to be entitled to redeem the premises so mortgaged to the plaintiff; and that William Jones, as such assignee as aforesaid, claimed to be entitled to the rent of £3 *per annum*, and all arrears thereof. And the bill, after containing the usual prayer for foreclosure against both defendants, prayed, that, if it should be more for the benefit of the plaintiff that the premises should be sold, then that they might be sold, and the proceeds thereof applied according to the power of sale in the mortgage deed; and that, for the purposes aforesaid, the rights of all parties under the indenture of the 16th May, 1837, might be declared; and that, if it should be declared that the rent of £3 *per annum* was subject to the mortgage, and the plaintiff should not be redeemed, then that the de-

fendant Griffith might be decreed to account to the plaintiff for the arrears of the said rent.

The defendant W. Jones, by his answer to the original bill, alleged, that he had already offered to disclaim, and he thereby disclaimed, all interest in the equity of redemption of the mortgaged premises. By his answer to the amended bill, he alleged, that he had, for the first time, been informed by the amended bill of the existence of the indenture of the 16th May, 1837; and, although he had never theretofore claimed any interest in the rent of £3 *per annum*, as in the amended bill mentioned, he *now* submitted, whether or not that rent was included in the plaintiff's security; and he claimed, as such assignee as in the bill mentioned, by way of submission to the judgment of the Court, to be entitled to the said rent for the residue of the term created by the said indenture, and the arrears thereof, or such right and interest therein as the Court should be of opinion he was entitled to as such assignee.

The defendant Griffith, by his answer, alleged, that he claimed such right and interest in the premises as, under the indenture of lease which had been made to him, dated the 6th May, 1837, he might be entitled to; but that, beyond that, he disclaimed all interest in the subject-matter of the suit; and he submitted, whether, in respect of such lease so made to him, he was a necessary party to the suit. He stated his willingness to pay the arrears of rent to the person entitled to receive the same.

Mr. *Russell* and Mr. *Lewin*, for the plaintiff.—The effect of the indenture of the 16th May, 1837, particularly the last clause of it, is to preserve whole the plaintiff's mortgage over every part of the property. But, supposing the Court should hold, that the deed does not so operate, the proviso at the end of it must, at least, have the effect of preserving the plaintiff's right and remedy as to the rent of £3 *per annum*. The assignee claiming under Robert

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Jones can only be entitled to the equity of redemption. The rent belongs to the plaintiff, in substitution for the interest which she gives up under the deed. With respect to parties, as the deed was capable of a double interpretation, and Griffith might have claimed to redeem, he was a proper party. As to Jones, there can be no doubt; and, although he disclaims all interest in the equity of redemption, he claims the rent, and is not entitled to his costs: *Collins v. Shirley (a)*.

Mr. *Sandys*, for the defendant W. Jones.—This defendant disclaims, by his answer, all interest in the equity of redemption, but submits the question of rent to the decision of the Court. Had the bill been simply a bill of foreclosure, as it ought to have been, there could have been no doubt of his being entitled to receive his costs from the plaintiff: *Thompson v. Kendal (b)*. As it is, he continues his disclaimer, but submits to the Court the question which is suggested by the amended bill. That question depends on the construction of the saving clause at the end of the indenture of May, 1837, which, it is submitted, cannot be in derogation of all that precedes it. Notwithstanding the extent of that clause, the rent must be taken to be exempt from the mortgage, and the defendant is entitled to it. Besides, the assignment in that deed is in consideration of a grant or rent-charge to Jones, his executor administrators, and assigns. The question, therefore, wholly at law, unless there be anything in the deed to convert Jones into a trustee for the plaintiff. If an action brought on the covenant for payment of rent, it must be brought by Jones or his assignees. [The *Vice-Chancellor*—Could Jones, under the clause of re-entry re-enter, possess, and retain the rents for his own use?]

Mr. *Wigram*, (with whom were Mr. *Harwood* and

(a) 1 Russ. & M. 638.

(b) 9 Sim. 397.

Prior), for the defendant Griffith, contended, that he was not a necessary party to the suit, for that an equitable title to money secured by a bond or covenant was not, of itself, sufficient to entitle the party interested to sue the obligor or covenantor in equity for payment of the money: *Rose v. Clarke* (a). And, here, the defendant Griffith was a mere stakeholder, ready to pay the arrears of rent in his hands to the party who should be entitled. He was, therefore, entitled to his costs.

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Mr. *Russell*, in reply.

THE VICE-CHANCELLOR.—Upon the question whether the defendant Griffith was to hold his lease or assignment, subject to the mortgage, or under an obligation to pay the interest of the mortgage besides his rent in order to be entitled to retain his term, I have no doubt. This must be answered in his favour.

It is possible that a strictly literal construction of the clause at the end of the deed of May, 1837, might lead to a different result; but it would also lead to the result, that the execution of the deed by Mrs. Edwards was wholly unnecessary. The law, as laid down by Sir *William Blackstone* and Lord *Coke*, relative to repugnant saving clauses in statutes, applies, I apprehend, also to other instruments (b). It is not necessary, however, in this case, to resort to that doctrine or to the rules relating to conditions subsequent, or to the way in which contradictory clauses in a deed are to be treated. To give literal effect to this clause, would be to overthrow the entire deed, and would be an irrational construction of it.

It is a different consideration, whether the rent of £3 *per annum*, for sixty years, is or is not by the deed given to Robert Jones. The rent is to be paid to him, his

(a) 1 Y. & C. C. C. 548.

(b) 1 Bla. Comm. 89.

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executors, administrators, or assigns, during the term; but there is a clause at the end of the deed which was intended to protect Mrs. Edwards's interest, and, upon a rational construction, I think that it cannot be considered as giving the £3 a year to Robert Jones. By the clause in question, nothing is to defeat the estate and interest of the plaintiff by virtue of the mortgage deed, as far as the same affects the leasehold hereditaments comprised in the original indenture of demise. The whole clause is very inaccurately expressed; but when I compare it with the recital, which mentions only an intention by the mortgagor to underlet, to which underletting the mortgagee assents,—and when I find the operative words of the deed referring to an underlease, and not to an assignment, and, under the clause of re-entry, a declaration that Jones is to re-enter and hold as in his first estate,—putting all these circumstances together, and considering the improbability that Mrs. Edwards should have meant to give away all benefit of the mortgage as to this property, it would be too much to say that the deed in question expresses more than this, that the mortgagor, wishing to demise part of the property, had obtained the concurrence of the mortgagee, so as to render the instrument good against the mortgagee, as a demise of part of the estate.

With regard to costs, Griffith was not a proper party, as far as the equity of redemption was concerned. If a proper party at all, he was so only with respect to the £3 a year. Upon the whole, I think that he is entitled to his costs.

As to the assignee, he does not desire to redeem, but he has claimed an interest in the £3 *per annum*; he cannot receive costs, though I will not make him pay costs.

DECLARE, that the defendant R. B. Griffith is entitled to the interest assigned by the indenture of the 16th May, 1837, exempt from the plaintiff's mortgage, and let the plaintiff pay him his costs of this suit. Let the defendant Jones execute to the plaintiff a proper assignment of

the rent of £3 *per annum* and the arrears thereof, and of the benefit of all the covenants and provisions of the indenture of the 16th May, 1837, and of all rights of re-entry thereby given to the bankrupt Robert Jones, and which now are or may become vested in the defendant William Jones, as assignee of the said bankrupt; such assignment to be settled by the Master if the parties differ. Let the rent of £3 *per annum* becoming due since the issuing of the fiat in bankruptcy be paid to the plaintiff. And, the defendant William Jones declining by his counsel to redeem the plaintiff, let him be absolutely foreclosed. Reserve subsequent costs, (if any). Liberty to any of the parties to apply.

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PIDGELY v. PIDGELY.

June 11th.

BY an indenture of settlement dated the 10th March, 1797, and made upon the marriage of John Moor Pidgely and Rebecca May, it was agreed, that the trustees of the settlement should stand possessed of a sum of £1000 Bank Stock, upon trust, from and after the death of Rebecca May and John Moor Pidgely, in case there should be any child or children of the intended marriage, that the trustees should pay and apply the said trust monies, and transfer and assign the several security and securities whereon the same should be then placed, unto and amongst all and every or such one or more of such child or children, at such time or times, in such shares and proportions, and with such limitations over for the benefit of some or one of the same children, as they the said Rebecca May and John Moor Pidgely should jointly in manner therein mentioned, or as the survivor of them should by deed or will, to be executed and attested as therein mentioned, give, direct, or appoint; and, in default of such gift, disposition, direction, or appointment, upon trust to pay the same, with the dividends, interest, produce, and increase thereof, or to assign and transfer the security or securities on which the same should be then placed, unto

General bequest of personalty, with a reference to all property over which the testator had a power of appointment, held to operate as an execution of a power. See 1 Vict. c. 26, s. 27.

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and amongst all and every the child and children of the marriage, if more than one, equally to be divided between them, share and share alike, and if but one, then solely to such only child, to be paid or assigned and transferred to such child or children respectively on his, her, or their attaining the age of twenty-one years. Power was given to the trustees, with the consent of the wife, to sell out any part of the stock, and to lend it to the husband on the security of his bond.

There were two children only of the marriage who attained twenty-one, namely, the plaintiff Frederick Pidgely, and Emma Moor, afterwards the wife of William Patch.

The Bank Stock was sold out, and lent by the trustees to the husband on his bond.

By a deed-poll, dated in January, 1827, under the hands and seals of John Moor Pidgely and Rebecca his wife, reciting the power contained in the settlement, and the number of children of the marriage, and that the stock had been sold out and lent to the husband, and that the husband and wife were desirous of appointing one moiety of the produce of the stock, and also one moiety of all other monies over which they had any power of appointment under the settlement, to Emma Moor Pidgely: It was witnessed, that, in pursuance and part execution of the said power &c., they, by that deed &c., appointed one full moiety of the produce of the said stock, and also one full moiety of and in all other monies and effects vested in the trustees of the settlement, and over which they the said J. M. Pidgely and Rebecca his wife had any power of appointment under the same indenture, to the said Emma Moor Pidgely, her executors, administrators, and assigns.

John Moor Pidgely survived his wife, and died in 1840.

By his will, dated the 18th January, 1838, John Moor Pidgely, after making various devises and bequests, as to all and singular the residue and remainder of his freehold, copyhold, and leasehold messuages, tenements, lands, and

hereditaments, wherever situate and of what nature soever, or over which he had any power of appointment or other testamentary disposition, with the appurtenances, and all his estate and interest therein, and as to all his monies and securities for money, goods, chattels, rights, credits, personal and testamentary estate and effects, or over which he had any right or power of appointment or other testamentary disposition, except certain household goods and effects thereinbefore specifically disposed of, gave, devised, and bequeathed, directed, limited, and appointed, the same, according to the quality of the estate, unto and to the use of certain trustees therein named, their heirs, executors, administrators, and assigns respectively, upon trust, as soon as conveniently might be after his decease, to raise and set apart, out of his residuary, real, and personal estate and effects, the sum of £3000, (the interest thereof, at the rate of *£4 per cent. per annum*, to commence from the day of his death, and continue payable until the said £3000 could be invested in the funds, or otherwise), and stand possessed of the said sum of £3000, and the securities for the same, upon trust to pay the rents, dividends, and annual income thereof respectively into the proper hands of his daughter for her life for her separate use, and without power of anticipation; and, after her decease, he directed, that the said sum of £3000, and the securities thereof, should be upon trust for her two daughters, (naming them), equally as tenants in common, and their several and respective heirs, executors, administrators, and assigns, according to the nature thereof; and, upon further trust, that his trustees should, subject to his debts, funeral expenses, charges of proving his will, and the legacies thereinbefore given, stand seised and possessed of the residue and remainder of his real, personal, and testamentary estate and effects, upon trust to pay the rents, issues, interest, dividends, and annual income thereof unto his son F. J. Pidgely for his life, and, after his decease, upon trust for

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the children of his said son, equally as tenants in common, and their several and respective heirs, executors, administrators, and assigns.

The Master, by his report in this cause, found, that the sum of 392*l.* 12*s.* 11*d.*, being the amount secured by the testator's bond, given by him to the trustees for the produce of the £1000 Bank Stock, together with 838*l.* 11*s.* 6*d.* for interest thereon from the day of the death of the testator, was subject to the power of appointment contained in the indenture of settlement of the 10th of March, 1797. And he found, that the said J. M. Pidgely, and Rebecca his wife, by the deed-poll dated the 29th of January, 1827, duly executed pursuant to the power contained in the said indenture of settlement, jointly appointed one half part of the produce of the said £1000 capital stock to the said E. M. Patch, then E. M. Pidgely, her executors, administrators, and assigns, absolutely. And he found, that the will of J. M. Pidgely operated as an appointment of the remaining half part of the said produce of the said sum of £1000 capital stock for the life of the plaintiff only, and not further or otherwise.

The cause now came on for hearing for further directions, and the question was, whether the will, as containing a general bequest, operated as a due execution of the power contained in the settlement, within the meaning of the stat. 1 *Vict. c.* 26, *s.* 27; the plaintiff and the defendant Mrs. Patch electing to take under the will subject to that question, and also admitting at the bar, that the testator had no other power than that contained in the settlement.

Mr. *Russell* and Mr. *Follett*, for the plaintiff.

Mr. *Wilbraham* and Mr. *Moore*, for the executors of J. M. Pidgely.

Mr. *Tripp*, for the defendant Mrs. Patch.—This bequest

was not intended to operate as an execution of the power. The power which the testator had was only a limited power, namely, a power of selection amongst his children; he could not exercise it in favour of issue in a remoter degree. But this is not a simple case of a party exceeding his power. Here there is a whole class of dispositions so irreconcilable with the power which is said to have been exercised, that it would be violent presumption to hold that he intended to execute it by this will. [The *Vice-Chancellor*.—Did he not intend to bequeath the personal estate over which he had *any* power of appointment?] The words are, “all *my* monies and securities for money, goods,” &c., shewing that he intended more particularly to refer to his *own* property. If so, the property comprised in the power cannot pass under these words: *Roach v. Haynes* (a), *Bradly v. Westcott* (b).

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THE VICE-CHANCELLOR.—The question is arguable; but I think that the probable intention of the testator was, that the settled and unsettled property should go together in one mass, especially as he had settled property in his own hands, secured by his own bond. As I am to assume that this was his only power of appointment, and this the only property over which he had a power of appointment, and as he not only gives, devises, and bequeaths, but directs, limits, and *appoints*, it is, I think, right to ascribe to him the intention of executing this power.

ALL the parties, except the trustees, by their counsel, waiving any reference back to the Master to inquire whether there was any other power than that mentioned in the report, and the trustees, by their counsel, not asking for any inquiry, Declare, that the will of the testator operated as an appointment of the remaining one half part of the produce of the sum of £1000 Bank Annuities comprised in the indenture of settlement

(a) 8 Ves. 588.

(b) 13 Ves. 445.

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of the 10th March, 1797, for the benefit of the plaintiff and the defendant Emma M. Patch, according to their respective interests under the will; and, the plaintiff and the defendant Emma M. Patch, by their counsel, electing to take under the said will, Declare, that such remaining one half part of such produce is subject to the several trusts and limitations of the said will.

June 12th.

The costs of a defendant trustee, notwithstanding he was a solicitor, ordered to be taxed as between solicitor and client.

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A person, who was made a defendant to this suit, in his character of trustee, was a solicitor. At the hearing of the cause the Court adjudged, that he was entitled to his costs, and the Registrar, in drawing up the minutes of the decree, stated, in the usual form in relation to trustees, that such costs were to be taxed as between solicitor and client.

A motion was now made, on behalf of the plaintiff, to vary the minutes, so as to give the defendant, on the ground of his being a solicitor, such costs, charges, and expenses only as he had properly paid out of pocket.

Mr. Russell, in support of the motion, cited *Collins v. Carey (a)*, *New v. Jones (b)*, and *Moore v. Frowd (c)*.

Mr. Simpkinson and Mr. Wood, contra.

The VICE-CHANCELLOR.—I am of opinion, that, where a solicitor, who is a trustee, is a defendant as a trustee, and is held to be entitled to his costs, the course of the Court is to direct those costs to be taxed as between solicitor and client, as in an ordinary case. It is a different question, how the language of the decree is to be construed

(a) 2 Bea. 128. (b) 9 Jarm. Conv. 338. (c) 3 Myl. & Cr. 45.

by the taxing officer. To say that the decree or order ought to declare that the party is entitled to no costs, except costs out of pocket, is, I apprehend, quite new. This case is not like those cited, which, if I may properly express any opinion upon them, seem to me to be correct as far as they go.

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CURRENT v. JAGO.

June 12th.

IN the year 1815, the plaintiff and her husband William Currant, since deceased, adopted as their child William Currant Jago, then an infant, who was the nephew of the plaintiff, being the son of William Jago by Mary his wife, the plaintiff's sister. W. C. Jago was accordingly maintained and educated by William Currant and the plaintiff, and resided with them until he went to sea.

A person invested certain monies in a savings-bank and in a private bank, in the name of his wife's nephew: —*Held*, under the circumstances of the case, that the monies were intended for the advancement of the nephew; and upon the death of the nephew intestate during his minority, the monies so invested were decreed to be paid to his administrator.

On the 23rd March, 1824, the plaintiff deposited the sum of £50 in the East Kerrier Savings-bank at Falmouth, in the name of W. C. Jago. On the 25th May, 1825, the amount standing in his name had been increased, by additions of interest, to the sum of 52*l.* 6*s.* 1*d.* On the 5th July, in the same year, the plaintiff drew out of the bank £2, part of that sum. On the 20th November, 1825, the account had been further increased, by additions of interest, to the sum of 51*l.* 6*s.* 2½*d.* On the 20th December the plaintiff paid the further sum of £30 into the savings-bank, and by such last payment, and by additions of interest, the amount had, on the 20th November, 1828, increased to the sum of 91*l.* 8*s.* 5½*d.*; on the 20th May, 1835, the amount had increased, by the additions of bonus and interest, to the sum of 114*l.* 8*s.* 6½*d.*; on the 20th May, 1842, to the sum of 144*l.* 3*s.* 5½*d.* With the exception of the before-mentioned sum of £2, neither William Currant nor the plaintiff ever drew out any part

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of the money so standing in the savings-bank, but from time to time the plaintiff called at the bank for the purpose of having the accumulations of interest added to the principal.

On the 17th December, 1825, the plaintiff deposited the sum of £300 in negotiable securities in the Cornish Naval Bank, in the name of William Currant Jago, upon the security of an interest and deposit note of that date, whereby the bank, thirty days after sight, promised to pay to William Currant Jago, or order, the sum of £300, for value received, and interest at the rate of £3 per cent. per annum till the day of acceptance, on the whole or such part thereof as might remain in their hands.

On the 23rd June, 1831, the plaintiff received all interest due upon this note, together with the principal sum of £300 thereby received, and she, at the same time, delivered to the bank, indorsed in the names of "William Currant," "William Currant Jago," to the bank to be cancelled. She, on the same day, re-issued the principal sum of £300, at the Cornish Naval Bank, in the name of her husband and herself, upon the security of another note of the bank, bearing date that day, whereby the principal sum of £300 was made payable, thirty days after sight, to William Currant and the plaintiff, "his Currant, or order, together with interest at the rate of £3 per cent. per annum, as before.

On the 1st April, 1833, the plaintiff's husband being very ill, she, through the medium of her sister, Mrs. Jago, received from the bank the principal and interest secured by the note of the 23rd June, 1831. That note, indorsed in the names of the plaintiff and her husband, was, at the same day, delivered up to the bank to be cancelled. At the same time, the principal sum of £300 was again issued at the Cornish Naval Bank in the name of William Currant Jago, upon the security of a deposit note dated the 1st April, 1833, whereby the principal sum of £300 was made payable, thirty days after sight, to William Currant

rant Jago, or order, together with interest at the rate of *£3 per cent. per annum*, in the same form as before.

On the 16th April, 1835, the same day on which the last-mentioned transaction took place, William Currant made his will, and thereby gave, devised, and bequeathed to the plaintiff all the money, security for money, goods, chattels, estate, and effects, of what nature or kind soever and wheresoever situate, and of which he might die possessed, for her sole and separate use for ever, and thereby nominated and appointed her his sole executrix. He died on the 19th May following.

William Currant Jago went to sea in the lifetime of the testator. He never returned, but died at sea, some time in the month of March, 1836, intestate and an infant.

On the 28th June, 1836, the plaintiff received from the then partners in the Cornish Naval Bank one year's interest on the deposit note of the 16th April, 1835, which became due on the 16th April, 1836; but, upon hearing of the death of William Currant Jago, the bank declined to pay any further interest or the principal, except to his representatives.

Upon the death of William Currant Jago, his father, the defendant William Jago, who had obtained letters of administration of his son's effects, claimed to be entitled to the sum of 144*l.* 3*s.* 5½*d.* standing in the East Kerrier Savings-bank in the name of William Currant Jago, and also to the principal sum of £300 invested in the Cornish Naval Bank on the security of the deposit note of 16th April, 1835, and then in the hands of the bank, together with all interest due thereon.

The bill, which was filed by Mrs. Currant against William Jago, the trustees of the East Kerrier Savings-bank, and the proprietors of the Cornish Naval Bank, alleged, that the investments were made with the sole view and intention of providing for William Currant Jago, *in the event of his surviving both the plaintiff and her husband*; and it

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sought a declaration, that the sums of 144*l.* 3*s.* 5½*d.* and £300, deposited and invested under the circumstances before mentioned, were held in trust for her, as widow and executrix of her deceased husband.

The cause now came on for hearing.

With reference to the payment of £2 to the plaintiff out of the money at the savings-bank, it was stated by a witness named Joseph Earle, a clerk of the bank, in his examination for the plaintiff, that, on the 5th July, 1825, the plaintiff came to the bank and was paid, in the deponent's presence, the sum of £2, being a year's interest on the deposit of £50; that the plaintiff brought no authority from William Currant Jago to receive the interest, but, on her stating that she required the interest for the use of the boy, the same was paid to her. The same witness, on his examination for the defendants, stated, that it was customary and usual for the savings-bank to require the person in whose name the money was converted to be present when the interest, or any part of the principal, was paid out of the bank; but that, on the occasion of the plaintiff's receiving the £2, the usual course had not been pursued.

Mr. *Russell* and Mr. *Welford*, for the plaintiff, admitted that the plaintiff and her late husband had maintained and educated the infant, and had intended to provide for his advancement; but they contended, that the presumption which arises in favour of a child, in the case of a purchase by a father in his child's name, does not arise where the party purchasing is only *in loco parentis*. In such case, the question of advancement or no advancement is a question of circumstances. Here the money in the Cornish Naval Bank had, in every instance, been dealt with by the plaintiff and her husband as their own. The indorsement of the original note in William Currant's name shewed that he did not intend an immediate benefit for the infant. And, with respect to both funds, it was evi—

dent (taking all the circumstances together) that the benefit to the infant was only intended to take place upon his surviving the uncle and aunt. They cited *Loyd v. Read* (a) and *Murless v. Franklin* (b).

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Mr. *Wigram*, Mr. *James Parker*, and Mr. *Collins*, for the several defendants.

In the course of the argument, Mr. *Wigram*, in answer to a question put to him by the Court upon the point of presumption in cases of adopted parentage, mentioned *Ebrand v. Dancer* (c). [The *Vice-Chancellor*.—There the

(a) 1 P. W. 607.

(b) 1 Swanst. 13.

(c) 2 Ch. Ca. 26. The case is thus stated : —

“The grandfather takes bonds in the name of his grandchildren, being infants, the father being dead.

“CHANCELLOR.—There is a difference in the case where the father is dead and where he is alive; for when the father is dead, the grandchildren are in the immediate care of the grandfather, and if he take bonds in their names, or make leases to them, it shall not be judged trusts, but provision for the grandchild, unless it be otherwise declared at the same time : and decreed, accordingly, on that reason, though there were other matters.”

It appears, from these remarks of the Chancellor, that the mere *legal* liability of a grandfather to provide for the grandchildren, the father being alive, (for that he is in such case legally liable is apparent from *Rex v. Cornish*, 2 B. & Ad. 498),

will not, under the circumstances mentioned, raise a presumption in favour of the grandchild. But, probably, the case of a grandfather actually *in loco parentis*, the father being alive, was not there contemplated. In such case, it is conceived that the presumption would arise for the grandchild. The cases in which, an uncle or grandfather being *in loco parentis*, and the father alive, the Court has presumed against double portions, seem to be analogous. See *Powys v. Mansfield*, 3 Myl. & Cr. 359; *Pym v. Lockyer*, 5 Myl. & Cr. 29. See, also, *Rogers v. Soutten*, 2 Keen, 598; *Stone v. Carr*, 2 Esp. 1.

It may here be remarked, that the relations now liable by statute to provide maintenance are the father, grandfather, mother, grandmother, and (to the age of sixteen or death of the mother) step-father. See stats. 43 Eliz. c. 2; 59 Geo. 3, c. 12, s. 26; 4 & 5 Will. 4, c. 76, ss. 56 and 57. The latter enactment overrules *Cooper v. Martin*,

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father was dead. Is there any case of grandfather, father, and son, the father alive?]

THE VICE-CHANCELLOR.—Mr. and Mrs. Currant, being childless, appear to have taken upon themselves the care of the infant son of Mrs. Currant's sister. Although both the parents of the infant were alive, the fact is admitted that Mr. and Mrs. Currant educated and maintained the boy as their own son, and that they intended to provide for his advancement in life. The plaintiff's counsel properly make that admission. In this state of things, Mrs. Currant, who seems to have been an active person, (for her husband never appears in the transactions), made from time to time payments into a savings-bank in the name of the boy. She also received interest on the deposits; and on one of these occasions, as stated by the witness Earle, she came to the bank and was paid the sum of £2, for a year's interest: it was paid to her upon her stating that she wanted it for the use of the boy. Now, if I am to look at this act at all, I must look upon it as an act done by her as agent for her husband. The case is so constructed that it must be looked upon as an honest act. We, therefore, find her, in the character I have stated, dealing with the fund as for the use of the boy. She then makes another payment to the same account, and calls at the bank from time to time as the interest accumulates, to have it added to the principal, and no change takes place in the form of the investment. Considering the statement of the witness already mentioned,—considering what a savings-bank is,—considering the mode in which this money was invested, and the admitted facts

4 East, 76. That the doctrine of adoption, according to the Roman law, has never been encouraged by the law of England, see the au-

thorities mentioned in Wood's Civil Law, b. 1, c. 2, and Harris's Just. Inst., b. 1, tit. 11.

relative to the connexion between Mr. and Mrs. Currant and the boy, there can be no doubt that this was intended to be the money of the boy, was vested in the boy by a legal title, and could not be claimed from him,—that is to say, was a gift executed; and that if, under some only of the circumstances, a presumption might have arisen in favour of the party whose money it originally was, the presumption is by all the circumstances taken together met and displaced, or prevented from arising.

If I am satisfied as to that part of the case, it is not an immaterial ingredient in the consideration of the circumstances relating to the other bank; as to which, it appears that Mrs. Currant, with the consent, as I must take it, of her husband, carries certain negotiable securities to the Cornish Naval Bank, and receives in exchange for them a note for £300 in the name of the boy, clearly vesting a legal title to the note in the boy. Some time afterwards, for what reason does not appear upon the evidence, she takes back the note, with the name of the boy upon it, and probably also, upon the evidence, with the name of her husband written upon it, and exchanges it for a note payable to her husband and herself, or their order. Now, if the infant ever had any legal title, that act could not displace it. Some time after this, the husband being ill, the plaintiff's sister carries back the note to the bank, and replaces it by another note in the name of the infant, according to the original state of things. It is suggested, and probably with truth, that this was done at the request of the plaintiff, through apprehensions arising from the husband's illness; the employment of the sister seems to shew a probable intention in favour of the infant. It would be erroneous to say that the taking of this new note in the name of the infant varied the legal title, because the legal title was never displaced. That the interest was received by the plaintiff and her husband is

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nothing; it was received during the infant's minority by those who took upon themselves the office and duty of parents.

The intention of the uncle and aunt to maintain and benefit the child is not denied, but it is said that the benefit was contingent upon their dying in the infant's lifetime. I think it possible, that, if their attention had been called to the subject, the gift would have assumed that shape; but the circumstances never so presented themselves to the minds of the parties, and accordingly the matter was not so arranged. Looking at what was done at the savings-bank,—looking at the position in which Mr. and Mrs. Currant had placed themselves in respect to the infant, and at the other circumstances of the case,—I am of opinion that the presumption in favour of William Currant did not exist or is displaced, that there was not a trust for the plaintiff's husband, that the money was intended as an advancement for the infant, and that the condition upon which it has been suggested to have been given is not established by the evidence. I think that there is sufficient evidence to shew that the legal title and the equitable title to the fund are the same.

DECLARE, that the defendant William Jago, as administrator of the son, is entitled to the fund, and let the trustees pay it over to him. Let the trustees of both classes receive their costs out of the fund. The plaintiff neither to receive nor to pay costs.

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MARTIN v. GLOVER.

June 21st.

JAMES TURTLE, by his will, dated the 22nd December, 1840, gave £1000 £3 10s. per Cent. Reduced Annuities to his executors, upon trust to pay the dividends to his the testator's wife, Hannah E. D. Turtle, she applying the same towards the maintenance of his granddaughter Mary Ann Cleveland, the daughter of his daughter Mary, then the wife of James S. Martin, by her former husband, until she should attain twenty-one, and then to the granddaughter for her life, and after her decease to her children when they should attain twenty-one, with cross remainders between them. The will then contained the following bequest:—"And all my household furniture, plate, linen, china, and household effects, and all other the rest and residue of my personal estate, of what nature or kind soever and wheresoever, I give and bequeath the same unto my wife the said Hannah E. D. Turtle."

Testator bequeathed the interest of £1000 stock to his granddaughter for life, and gave the residue of his personal estate to his wife. He then, after giving certain benefits to his daughter and granddaughter out of his real estate, directed, that, in case both of them, his said daughter and granddaughter, should die without leaving children to attain twenty-one, the proceeds of the sale of the real estate, *together with the said £1000 stock*, should go to the persons who would have been entitled to his personal estate under the Statute of Distributions in case he had died intestate:

—*Held*, that the right of the widow to the £1000 stock under the residuary clause was divested by the subsequent clause, although she was herself one of the persons who, by virtue of that clause, and in the event therein mentioned, was to share the £1000 stock; but held also, that, until the event happened on which the gift was divested, she was entitled to all the dividends.

Construction of the word "other" contained in a residuary bequest of "all other the rest and residue" of the testator's personal estate.

Bequest of £1000 stock in a certain event "to the person or persons who would, under the Statute of Distribution of Intestates' Effects, have been entitled to my personal estate in case I had not disposed of the same by will." The description of the legatees is not one of persons, but of interest, and therefore their shares will not be equal, but according to the statute.

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granddaughter, shall die without leaving any child or children who shall live to attain the said age of twenty-one years, then I do hereby direct and declare, that all my said residuary real estate shall be sold by my said trustees, and that the proceeds of such sale, together with the said sum of £1000 stock hereinbefore bequeathed, shall be held and applied by my said trustees, in trust for the person or persons who would, under the Statute for the Distribution of Intestates' Effects, have been entitled to my personal estate in case I had not disposed of the same by will."

The testator died in August, 1843, leaving his widow and daughter, the only persons who would have been entitled to his personal estate under the Statute of Distributions, in case he had died intestate.

Mary Ann Cleveland died in the following December, the dividends up to her decease having been paid to the widow. The testator's daughter had another child, namely, William Martin, an infant. The bill was filed by the daughter and her husband, for the purpose of obtaining a declaration as to the rights of the parties.

Mr. *Anderdon* and Mr. *Miller*, for the plaintiffs, contended, that the £1000 stock was not included in the residuary gift to the widow; the meaning of the testator being, that his wife should have all his household furniture, &c., and all other his personal estate, except the £1000 stock. And this construction was borne out by the subsequent bequest of the stock in the event of the daughter and granddaughter dying without leaving children to attain twenty-one; from which it appeared clear that the testator could not have intended to include it in the prior bequest of the residue. Then, inasmuch as the intermediate dividends until the happening of the event on which the legacy was to take effect were undisposed of, they must accumulate and go with the capital when the event occurred. The next of kin who would be then entitled to the benefit of

distribution would be the present next of kin, namely, the plaintiff Mrs. Martin and the widow.

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Mr. *Austen*, for the infant, submitted, that the next of kin to take would be those who might answer that description upon the happening of the contingency. [The *Vice-Chancellor*.—What, then, becomes of the words “in case I had not disposed of the same by will” ?]

Mr. *Shapter*, (with whom was Mr. *Warren*), for the widow, being called upon by the *Vice-Chancellor* to state what he claimed, said, that he claimed the whole residue, subject to its being divested in case Mrs. Martin should die without leaving any child who should attain twenty-one; but, as one-third would be divested in favour of herself, the effect would be, that she would be entitled immediately to one-third of the capital, and the income of the remaining two-thirds until events should decide to whom the capital would belong. [He was then stopped by the Court.]

THE VICE-CHANCELLOR.—I cannot accede to the argument, that, if the will had stopped at the words “and all other the rest and residue of my personal estate, of what nature or kind soever and wheresoever, I give and bequeath the same unto my wife, the said Hannah E. D. Turtle,” the widow would not have been entitled to the fund in question. The word “other,” as used by this testator, does not restrict the ordinary effect of the gift as a gift of residue. The testator, after enumerating several subjects, as household furniture, &c., goes on and bequeaths all other the rest and residue of his personal estate. I am of opinion, that these words, standing alone, would have constituted the widow complete residuary legatee, and, therefore, complete legatee of every interest in the stock which had not been disposed of.

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But the testator, or the person who had to prepare this will, in a subsequent part of it, proceeds to deal with the property in a manner that hardly coincides with what has gone before. Still the language of the will, whether the result of caprice or not, must be abided by, according to the ordinary rules of interpretation ; and the effect here is, to take away from the residuary legatee a certain proportion of her legacy upon the happening of an event within the limits allowed by law. The testator has in effect said, " Though I have given this sum to my wife absolutely, yet, if my daughter and granddaughter die without leaving children to attain twenty-one, I will take it away from my wife and give it to those persons who would have taken my personal estate at my decease had I died intestate, of whom my wife may be one." The testator had a right to say so, and he has said so. This, stock, however, is in fact a perpetual annuity, and the dividends must be received by the person to whom it is given till the contingency happens. Until that period, therefore, the widow will take the whole dividends. With respect to the capital, the persons to take are those who would have been entitled, under the Statute of Distributions, to the testator's effects, in case he had died intestate; the persons so entitled are the widow and daughter. They cannot, I think, take equally, because the description in the will is one not of persons merely, but of interest also. I will, however, hear this question argued, if desired. [Counsel declined to argue the point.] Then—

It being admitted that Mary Ann Cleveland died an infant without having been married, and that the testator's only next of kin at his death was Mrs. Martin, Declare the widow absolutely entitled to one-third of the stock, and let the dividends on the other two-thirds be paid to her during the life of her daughter, or until further order. Liberty to apply.

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ANONYMOUS.

June 25th.

UPON the motion of Mr. *Elmsley* for an absolute order of foreclosure, it appeared that the mortgagor had been ordered to pay the mortgage money at the Rolls Chapel, between the hours of eleven and twelve in the forenoon, but that the mortgagee had not attended there until twenty minutes after eleven, and then waited an hour, during which time the mortgagor had not appeared.—The Court made the order as prayed.

Foreclosure may be made absolute although the mortgagee does not attend at the first moment of the time appointed for payment of the mortgage money.

WOODCOCK v. MONCKTON.

June 25th.

IN 1835, a marriage was solemnized in Bengal, between the defendant Edward Henry Cradock Monckton and Caroline Rosa Woodcock, a daughter of the plaintiff, who had then attained her age of twenty-one years. At the time of the marriage, Caroline Rosa Woodcock was absolutely entitled, under the will of her grandfather, to the sum of £1500 cash, then in the hands of the plaintiff in England. No settlement was made previous to the marriage.

Upon the construction of a post-nuptial marriage settlement—*Held*, that the covenants entered into by one party were binding upon him only upon the condition of the other party being bound by certain other covenants in the instrument; and that, as the latter party was under no obligation to execute the instrument, and refused to do so, the former party was not bound by the instrument in equity, although he had executed it, and although the covenants contained in it were for the benefit of an infant.

Upon the plaintiff being apprized of the marriage, he was desirous that a settlement should be executed; and, accordingly, some time in October, 1836, he proposed to the defendant Edward Monckton, the uncle of Edward H. C. Monckton, that the before-mentioned sum of £1500 should be settled on his daughter and her children; but that her husband should have the interest during the joint lives of himself and his wife, and during the remainder of his own life if he should survive her, and that, in the event of her having no children, the principal should be at her disposal by her will. The plaintiff, at the same time, proposed that he, the plaintiff, should covenant to give or bequeath the sum of £5500 for the benefit of his daughter

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and her children, and, in the event of her death without children, to give or bequeath half of that sum to the husband. He also further proposed that the husband should covenant that he would, as his circumstances should from time to time permit, settle upon his wife and the children of the marriage an equivalent sum of £7000; and that he should also covenant, that, in the event of his coming into possession of the Somerford estate, in Staffordshire, he would, under the provisions of his paternal grandfather's will, charge that estate with the payment to his wife for her life of a jointure of £600 *per annum*.

These proposals were acceded to by the defendant Edward Monckton, though not, as it appeared, with the privity of his nephew; and it was agreed between him and the plaintiff, that they should form the basis of a settlement, to be prepared under the advice of their respective solicitors.

Before the settlement was prepared, Edward Henry Cradock Monckton transmitted to England a paper, dated June 7th, 1836, signed by himself and his wife, and addressed to Messrs. Fletcher, Alexander, & Co., which, after referring to a power of attorney given to that firm, in relation to the £1500 belonging to his wife, proceeded in these terms:—"I shall feel obliged by your placing the same, both principal and interest, under the joint charge and control of my uncle Mr. Edmund Monckton and the Rev. Charles Woodcock, Mrs. Monckton's brother, the above gentlemen to be joint trustees of the whole amount for Mrs. Monckton and her children, (should she have any), and to see that on my death she and her child or children conjointly receive the interest; and the principal, on her decease, (with the accumulated interest), shall be duly apportioned to her children, as, according to the judgment of the above trustees, the necessities of those children shall demand at the time of their coming of age. This much as regards the capital: the interest will, after the decease of Mrs. Monckton, be also left to the discretion of the

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trustees as to whether it shall be left to accumulate during the minority of the children, or whether it shall be spent according to their exigencies ; but in case of Mrs. Monckton's decease without issue, I being the survivor, the capital, with accumulated interest, to revert to me : in the case of her being the survivor without issue, on her death the capital, with any interest that may have accumulated, to go to her eldest brother."

In pursuance of the directions contained in this paper, the sum of £1500 therein mentioned was, on the 21st of February, 1837, invested in the purchase of £1657 Consols, in the names of Edmund Monckton and Charles Woodcock the younger.

A few days after this investment was made, the settlement which had been agreed upon between the plaintiff and the defendant Edward Monckton, and the draft of which had been previously approved by their respective solicitors, was duly executed by them, with a view to its being sent out to India to be executed by Edward Henry Cradock Monckton and his wife.

The settlement purported to bear date the 24th of February, 1837, and to be made between Edward Henry Cradock Monckton and Caroline Rosa his wife of the first part, the plaintiff of the second part, and the defendants Charles Woodcock the younger and Edward Monckton of the third part. After reciting the marriage, and that there had been no previous settlement, and after reciting the title of the wife to the £1657 Consols, and reciting that plaintiff, being desirous of making a settled provision for the said Caroline Rosa Monckton and her said husband, and the issue of their marriage, had agreed to enter into the defeazible covenants thereafter on his part contained, for the payment to the said Charles Woodcock the younger and Edward Monckton of the sum of £5500 sterling, with interest thereon as thereafter mentioned, upon the trusts thereafter declared of the same, *in consideration of the*

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settlement intended to be thereby effected by the said Edward H. C. Monckton of the sum of £1657 Consols, and of the covenants thereafter entered into by the said Edward H. C. Monckton: It was witnessed, that, in pursuance of the said agreement, and in consideration of the premises, the plaintiff, with the privity and consent of the said Edward H. C. Monckton and Caroline Rosa his wife, did, for himself, his heirs, executors, and administrators, covenant with the said Charles Woodcock the younger and Edward Monckton, their executors, administrators, and assigns, that the plaintiff, in his lifetime, or his executors or administrators, within six calendar months next after his decease, would well and truly pay or cause to be paid to the said Charles Woodcock the younger and Edward Monckton, their executors, administrators, or assigns, the sum of £5500 of lawful British money, with interest for the same as therein mentioned from the day of his decease, to be applied by them upon the trusts thereafter declared concerning the same. It was then declared that the trustees should stand possessed of the £1657 Consols, and of the £5500 when received, upon trust, to pay the dividends to the husband and wife for their lives; and after the death of the survivor of them, in trust, as to the capital, for the children of the marriage, as the parents or the survivor of them should appoint, and in default of appointment, in trust for all the children equally, the shares of sons to be vested at twenty-one, those of daughters to be vested at that age, or marriage under that age with consent; and in case there should be only one such child, who being a son should attain that age, or being a daughter should attain that age, or be married with consent as before mentioned, in trust for such one child absolutely: provided, that, in case there should be no such child, and Edward H. C. Monckton should survive his wife, then, as to the £1657 Consols, in trust for him absolutely, and, as to the £5500, in trust for the appointees, &c. of his wife; with a further proviso,

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that, if the wife should die without such issue as before mentioned in the lifetime both of her husband and the plaintiff, the plaintiff's covenant as to the £5500 should cease; but that his executors should pay to the husband an annuity of £100 for his life. The indenture then purported to contain covenants on the part of the husband to settle the property of the wife accruing during the coverture, and also a sum of £7000, to be raised from time to time by the husband, by means of instalments suited to his means, upon the same trusts as were thereinbefore declared concerning the £1657 Consols; and also to charge the Somerford estate, when he should come into possession of it, with a jointure of £600 a year for his wife.

Soon after the execution of this settlement by the plaintiff and the defendant Edward Monckton, it was sent to India for the execution of Edward H. C. Monckton and his wife. Before its arrival, however, in that country, Caroline Rosa Monckton died, leaving an infant child Rosa Monckton.

Edward H. C. Monckton received the settlement, but refused to adopt its provisions and returned it unexecuted.

The bill, which was filed against Edward H. C. Monckton, Edward Monckton, Charles Woodcock the younger, and the infant Rosa Monckton, charged that the execution by the plaintiff and the defendant Edward Monckton of the indenture of the 24th February, 1837, was not absolute, but conditional, and not intended to render that indenture operative or binding upon the plaintiff or any other party thereto, unless and except in the event of Edward H. C. Monckton and his wife conforming thereto, and executing the same. The bill also charged, that the indenture was signed and sealed by the plaintiff as an escrow only. It prayed a declaration, that the indenture was inoperative and void, and that it might be delivered up to the plaintiff to be cancelled.

The defendant Edward Monckton, by his answer, sub-

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mitted, that the infant defendant Rosa Monckton had an interest under the covenant of the plaintiff contained in the indenture, and that such interest did not depend upon the fact of the indenture being executed by Edward H. C. Monckton. He denied the allegation in the bill, that his execution of the indenture was only conditional, and intended to render the deed operative and binding on the plaintiff only in the event in the bill mentioned. He alleged, that it was not contemplated by him, nor, as he believed, by the plaintiff or any person concerned in the preparation of the deed, that the plaintiff's covenant therein should be conditional; and he denied, to the best of his belief, that the plaintiff's execution of the deed was conditional.

The cause now came on for hearing, and, in support of the plaintiff's case, the evidence of his solicitor was read. In the course of his evidence, the deponent stated that the deed was, as he considered, delivered by the plaintiff as an escrow.

Mr. *Koe* and Mr. *Parry*, for the plaintiff, contended, that, by the terms of the settlement, the plaintiff was not to be bound unless the husband was bound.

Mr. *Wigram* and Mr. *Kenyon*, for the defendant Edward Monckton.

Mr. *Paton* for the defendant Charles Woodcock the younger.

Mr. *Swanston* and Mr. *Craig*, for the infant defendant.—The plaintiff most distinctly executed the settlement. He may have done so in confidence that the husband would also execute it; but that does not relieve him of his obligation. [The *Vice-Chancellor*.—It may be generally true, that, in ante-nuptial settlements, failure in the perform-

ance of covenants by one party does not exempt the other party. Was the husband bound to execute this settlement?] Supposing the husband not bound, it is still a question, whether the plaintiff is entitled to the intervention of this Court. If he has taken upon himself an obligation for the benefit of an infant, upon what principle can he be relieved, in this Court, against the consequences of his own act? He contends, that he is not to be bound by the covenants which he has entered into, unless the husband executes the deed. But, if that question arises on the face of the deed, it is not a question for the consideration of this Court, but of a court of law: *Simpson v. Lord Howden* (a). If, on the other hand, it does not so arise, he must give in evidence circumstances rendering it proper for this Court to interfere. Now, he proposes, by the evidence of one witness, to shew that the deed was delivered as an escrow. The witness, however, only says that he considered it to be so delivered. The probability, therefore, is, that it was delivered in the ordinary manner, which, in the case of an escrow, is insufficient: *Shep. Touch.* 58.

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The VICE-CHANCELLOR.—The questions to be decided are, whether, in equity, the plaintiff Mr. Woodcock is or is not bound by this deed, and whether the Court ought to interfere to make a declaration on the subject, or leave him under this species of cloud, which, seeing that he certainly cannot be sued upon the covenant during his lifetime, would, unless removed, remain hanging over him during the whole of that period. Under the circumstances of this case, I think that it would be monstrous to say, that he should be left in such a situation.

It is recited in the deed, that the plaintiff had agreed to enter into the covenants thereafter contained on his part in *consideration* of the settlement intended to be

(a) 3 Myl. & Cr. 97.

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thereby effected by Edward H. C. Monckton of the sum of £1657 Consols, and of the covenants thereafter entered into by the said Edward H. C. Monckton. One of these covenants is for the payment, by Edward H. C. Monckton in a specified manner, of the sum of £7000. I am of opinion that the intention to be collected is, that Mr Woodcock was not to be bound unless Mr. Edward H. C. Monckton should do, or become bound to do, that which is mentioned in the deed as to be done on his part. It is not contended, and could not be, that Edward H. C. Monckton was bound to execute this instrument or bound by any analogous contract or engagement. He had a right to reject the whole. He has rejected it. It is not necessary to say, and I do not say, whether, as to Mr. Woodcock, this instrument was a deed or an escrow. It is not necessary to decide, and I do not decide, whether an action could or could not be maintained upon it, after his death, against his executors. However these two questions ought to be answered, I am of opinion that it is the duty of this Court to declare, that Mr. Edward H. C. Monckton, having had the right, and exercised the right, to reject this arrangement, Mr. Woodcock is not bound by it.

THE defendant Edward H. C. Monckton not having executed, and not intending to execute, and it appearing that he is not bound to execute the instrument bearing date the 24th of February, 1837, Declare that the plaintiff is not bound by it. Let the instrument be deposited in the Master's Office, there to remain till further order. Refer it to the Master, to inquire whether the defendant Rosa Monckton is the sole issue of the marriage: and if the Master shall find that she is the sole issue, let him inquire by what means the sum of £1657 Consols was purchased and acquired, and to what trust or trusts the same is subject, with liberty to state any circumstances specially.

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HAMMOND v. MAULE.

June 25th.

JOHN BRADBURNE, by his will, dated the 18th May, 1809, bequeathed as follows:—"I give and bequeath to the Rev. Henry Hammond the sum of £1000, to be paid to him, his executors or administrators, within nine calendar months next after my decease, upon the trusts following; (that is to say), upon trust, to lay out and invest the said sum of £1000 immediately, as the same shall come to his hands, in the purchase of £3 per Cent. Consolidated Bank Annuities, or £3 per Cent. Reduced Bank Annuities, according to which of the said funds shall be then open for the transfer of stock; and upon further trust, to pay the interest or dividends of the stock purchased with the said sum of £1000, as the same interest and dividends shall become due and payable, to my late servant Sarah Gyett, for her natural life, for her own use and benefit; and immediately after the decease of the said Sarah Gyett, upon trust, and I will and direct, that the said stock or fund purchased with the said sum of £1000 as aforesaid shall be transferred and paid to her daughter Sarah Gyett, in case she shall then have attained her age of twenty-one years, for her own absolute use and benefit; but in case the said Sarah Gyett shall not have attained her age of twenty-one years at the decease of her said mother, then upon trust, to pay to or apply the said interest and dividends, as the same shall become due and payable, for the maintenance and support of the said Sarah Gyett until she shall attain such age of twenty-one years, and upon her attainment thereof, upon trust, to transfer the said

Bequest of £1000 to A., upon trust, to lay the same out in Consols, and pay the interest and dividends to B. for life; and immediately after her decease, upon trust, that the said stock should be transferred to B.'s daughter C., in case she should then have attained her age of twenty-one years, for her absolute use and benefit; but in case the said C. should not have attained her age of twenty-one years at the decease of her said mother, then upon trust, to pay and apply the said interest and dividends, as the same should become due and payable, for the maintenance and support of the said C. until she should attain such age of twenty-one years, and upon her attainment thereof, upon trust, to transfer the

aid stock or fund to the said C., for her use and benefit. B. and C. survived the testator. Afterwards C. died in the lifetime of B. without having attained the age of twenty-one years:—*Held*, that C. took a vested interest in the £1000.

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stock or fund to the said Sarah Gyett, for her own use and benefit." The testator then directed, that all the rest, residue and remainder of his personal estate and effects, not thereinbefore by him bequeathed or disposed of, should be paid to and divided amongst all his sons, in equal shares and proportions.

The testator died shortly after the date of his will, leaving the mother Sarah Gyett and her daughter surviving him. Sarah Gyett the younger was illegitimate, and died an infant in the lifetime of her mother, whereupon letters of administration of her effects were taken out on behalf of the Crown. Before the death of Sarah Gyett the elder, the present bill was filed, and the question in the cause was, whether the bequest to Sarah Gyett the younger vested immediately at the death of the testator, in which case the Crown would take; or whether it was contingent upon her surviving her mother, and attaining twenty-one, in which case the fund would fall into the residue.

Mr. Cooper and Mr. Hanson, for the plaintiff.

Mr. Wigram and Mr. Stoughton, for some of the residuary legatees.—The gift to Sarah Gyett the younger is contained only in the direction to transfer, and is in itself a distinct gift: the legacy, therefore, is not vested, but contingent on the legatee attaining twenty-one. The testator has disposed of the legacy in two events only, namely, the legatee attaining twenty-one in her mother's lifetime, or her surviving her mother and then attaining twenty-one; but he has not provided for the case which has happened, namely, her dying under twenty-one in the mother's lifetime. It was essential to the vesting of this legacy, that the daughter should survive her mother and attain twenty-one. The direction for payment of interest by way of maintenance only would not be sufficient to vest it: *Bals-*

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ford v. Kebbell (a), Pulsford v. Hunter (b), Taylor v. Bacon (c), Watson v. Hayes (d), Butcher v. Leach (e). [The Vice-Chancellor.—Can a decision in your favour be consistent with *Hanson v. Graham (f)* ?] Here, the words used with reference to the party's attaining twenty-one are "in case," which more strongly import a condition than the word "when," which was the word used in *Hanson v. Graham*. In that case, also, the interest was to be applied for the benefit of the grandchildren until they should attain twenty-one, "and for no other use, intent, and purpose whatsoever." The interest was not merely to be applied for maintenance; and Sir *William Grant*, in his judgment, notices that circumstance. Upon that point *Pulsford v. Hunter* is strictly applicable.

Mr. *Spence* and Mr. *Wood*, for others of the residuary legatees, observed, that the gift in *Hanson v. Graham* was immediate, and not, as here, in reversion; and that here it was only a contingent reversionary interest. [The Vice-Chancellor.—Suppose that the daughter had attained twenty-one and then died in the mother's lifetime, to whom would the legacy have belonged ?]

Mr. *Twiss* and Mr. *Wray*, for the Crown, were stopped by the Court.

THE VICE-CHANCELLOR.—In this case it has been, in form, contended, but scarcely, I think, argued, that the death of the tenant for life, living the other legatee, was essential to vest the gift to her. I am of opinion, that clearly it was not. The mere circumstance of the gift of a legacy

(a) 3 Ves. 363. See 3 Y. & C.
574, n. (a).
(b) 3 Bro. C. C. 416.
(c) 8 Sim. 100.

(d) 5 Myl. & Cr. 125.
(e) 5 Beav. 392.
(f) 6 Ves. 239.

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being postponed, in point of enjoyment, for the benefit of a tenant for life, of course, does not affect the vesting ; as, if there be a trust to pay the dividends of a fund to A. for life, and after A.'s death, to pay the fund to B. : in such a case, B.'s legacy is not contingent. The enjoyment merely, and not the vesting, is postponed.

Then, if survivorship was not essential to vest the gift, the question is, whether the words are such as to postpone the vesting until the majority of the daughter. I am of opinion that the testator has used words, the construction of which has been settled by a long course of decisions from which it is impossible, if it could be expedient, to depart.

Where a legacy is given in terms importing a gift at a future time, but the whole fruit and produce of the legacy is, in the meantime, given to the legatee, it is generally the rule not to hold those words to be conditional which, standing alone, would be conditional. That, I apprehend, has been much too long settled to be disturbed. In this case the testator in effect gives the interest of a fund to the mother for life, and directs, that, after her death, the interest shall be paid for the daughter's use until her majority, when the principal shall be paid to her. This legacy is vested in the daughter certainly.

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CONDUITT v. SOANE.

June 27th.

SIR JOHN SOANE, by his will, dated the 11th May, 1833, (amongst other things), directed that his gold medal, received of the Royal Academy as a prize for the best architectural design, and his diamond ring, which was a present from the Emperor of Russia, and his gold ring with the hair of Napoleon Buonaparte, and his plate, should be continued and kept as heir-looms in his family, so far as the rules of law would allow; and for that purpose, that his grandson John Soane should have the use thereof during his life, and after his decease, that the same should be delivered over to such one of his sons who should first attain the age of twenty-one years.

Practice as to
tenant for life
giving security
for heir-looms.

The testator afterwards made several codicils to his will; by the second of which, dated the 22nd August, 1836, he directed that *his plate*, which was then at the museum, (except certain specified articles), should be retained until his grandson John Soane should reach his age of twenty-five years, and then, that the said plate should be delivered to him, if living, and preserved and continued in the nature of heir-looms.

The testator died on the 20th January, 1837.

By an order dated the 6th July, 1842, made by *Knight Bruce*, V.-C., on the hearing of the cause for further directions, it was ordered that an inventory should be taken of the several specific things mentioned in the testator's will, and thereby directed to go as heir-looms. And it was ordered, that two parts should be made thereof, and should be signed by the said John Soane, when he should attain the age of twenty-one years; and that one part thereof should be kept by the said John Soane, and the other part deposited with the Master for the benefit of the persons interested therein. And it was ordered, that the gold medal, diamond ring, and gold ring, part of such heir-looms, should be delivered to the said John Soane on his

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attaining his majority; and that the remainder of such heir-looms should be delivered to the said John Soane on his attaining the age of twenty-five years, for his use during his life, *the said John Soane first entering into such security for the said heir-looms as the said Master should approve.*

The point as to giving security for the heir-looms was not brought under the attention of the Court or adverted to by any of the counsel in the cause when the order was made; and John Soane, the grandson of the testator, having attained his age of twenty-one years, presented his petition of re-hearing in 1844, to have the cause re-heard as to that part of the order on further directions dated the 6th July, 1842, whereby he was directed or required, before the delivery to him of the heir-looms, to enter into such security for the same as the Master should approve.

The cause, accordingly, now came on for re-hearing.

Mr. *Teed* and Mr. *Messiter*, for John Soane, the grandson, said, that the practice as to a tenant for life giving security for heir-looms was settled by the case of *Foley v. Burnell* (a); and that all that the Court now required from the tenant for life (unless where danger was apprehended) was an inventory, and an undertaking to take proper care of the heir-looms.

Mr. *Simpkinson* and Mr. *Willcock* appeared for other parties.

The VICE-CHANCELLOR was of opinion that the present practice was as stated at the bar and as settled by the case referred to, and that there ought to be danger in order to justify the requisition of security. His Honor accordingly directed the order of the 6th July, 1842, to be varied by a direction that the heir-looms should be delivered to John

(a) 1 Bro. C. C. 279.

Soane, on his signing an inventory and an undertaking to take proper care of them. The deposit to be returned, and, under the circumstances of the case, the costs of all parties to be paid out of the testator's estate.

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HORLOCK v. SMITH.
HORLOCK v. PRIESTLY.
PRIESTLY v. HORLOCK.
YARDE v. BURFORD.
YARDE v. PRIESTLY.
THOMAS v. PRIESTLY.
BURFORD v. THOMAS.
THOMAS v. PRIESTLY.

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BY the decree made on the hearing of the second and third mentioned suits, dated the 7th of December, 1827, it was, amongst other things, declared, that Jane Priestly, widow, the defendant in the second, and plaintiff in the third of the said suits, was the first incumbrancer upon the estate in question in the said causes, for what was due to her for principal and interest in respect of her mortgage in the pleadings mentioned. And it was referred to the Master, to take an account of what was due in respect of such principal and interest, and to tax her costs of the said suits. And it was ordered, that the sum of 145*l.* 2*s.* 1*d.* cash in the Bank, placed to the credit of the cause "Horlock v. Priestly," should be paid to the said Jane Priestly, in part satisfaction of what was due to her for principal and interest, and that the receiver, appointed in the causes, of the rents and profits of the estate in question, should be discharged, and

Circumstances under which a mortgagee in possession was exonerated from having the mortgage account taken with annual rests.

A sum which was in Court at the time the mortgagee took possession—*Held*, under the circumstances, to go in discharge of the mortgagee's interest due at that time.

Rent received by the receiver before the mortgagee took possession, but not paid to her till afterwards, as—

~~summed~~, under the circumstances of the case, (but not decided), to go in discharge of the interest due to the mortgagee at the time of taking possession.

Rent which did not appear to have been received by the receiver before the mortgagee took possession—*Held*, under the circumstances of the case, not to go in discharge of the interest due to the mortgagee at the time of taking possession.

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should pass his accounts before the Master, and pay the balance which should be reported due from him to the said J. Priestly in further part satisfaction of what should be found due to her for principal and interest; and upon payment by the said receiver of his said balance to the said J. Priestly, he was to be at liberty to apply to this Court to have his recognizance vacated.

By a report of the 30th of August, 1830, made in pursuance of this decree, the Master certified that he had proceeded to take an account of the receipts and payments of the receiver from Lady-day 1827, to which day he had passed his former account, to Lady-day 1830; and he found, that the receiver had, during that time, received out of the rents and profits of the estate several sums, which, including the sum of 269*l.* 12*s.* 4*d.*, the balance of his said former account, amounted in the whole to the sum of 663*l.* 8*s.* 4*d.*; and he found, that the receiver had thereout paid, for various outgoings, several sums of money, which, including his salary and the costs of passing his said account, and also including the said sum of 269*l.* 12*s.* 4*d.*, (the balance of the said former account paid by him to the said Jane Priestly, the plaintiff in the third-mentioned cause, pursuant to an order for that purpose), amounted in the whole to the sum of 365*l.* 14*s.* 11*d.*, which last-mentioned sum being deducted from the said sum of 663*l.* 8*s.* 4*d.*, there remained in the hands of the receiver, on the balance of his said account to Lady-day 1830, the sum of 297*l.* 13*s.* 5*d.*; which account being duly vouched, he the Master had allowed, and had caused the same to be entered in two books, one whereof, signed by him, was for the said receiver, and one remained in his, the Master's, custody which said balance or sum of 297*l.* 13*s.* 5*d.* was to be paid by the said receiver to the said Jane Priestly, in further part satisfaction of what should be found due to her for principal and interest, according to the directions of the said decree.

By an order of the 30th of November, 1830, the recog

nizance of the receiver and his sureties was ordered to be vacated.

By the decree made on the hearing of the sixth above-mentioned cause, dated the 16th December, 1837, it was ordered, that the orders and decrees made in the first three causes, dated the 7th March, 1820, and the 7th December, 1827, and the several accounts and inquiries thereby directed, should be carried on and prosecuted between the parties to the sixth suit in like manner as thereby directed between the parties to the previous suits; and it was referred to the Master, to take an account of the rents, issues, and profits of the mortgaged premises received by the said Jane Priestly, or which might have been received without her wilful default, or by any person or persons by her order or for her use, since she entered into possession. And the Master was also to inquire when the said Jane Priestly took possession of the premises, and what was owing to her when she so entered into possession on account of principal money and interest.

The Master, by his general report made in all the causes, dated the 23rd May, 1844, (amongst other things), found, that, by a surrender dated the 1st of May, 1790, Thomas Bennett and Elizabeth his wife executed a conditional surrender of the premises in question, which were holden of the manor of Weedonbeck, in the county of Northampton, to the use of the said Jane Priestly (by her then name of Jane Hutton) and her heirs, for securing the re-payment of £1000 and interest, at 4*l.* 10*s.* *per cent.*, on the 1st day of November then next. That the mortgaged premises were, in the year 1809, sold (subject to the mortgage) to Thomas Smith, one of the defendants in the first-mentioned cause, who continued the payment of the interest due on the mortgage up to the 1st August, 1818, after which time, the interest having got into arrear, Mrs. Priestly, for the purpose of proceeding by ejectment to recover the premises, applied to be admitted under the said conditional surrender, when it was discovered that the same, although duly

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presented, had, by neglect of the steward, been omitted to be inrolled; that Mrs. Priestly, however, obtained a presentment *de novo* of her mortgage security, and was duly admitted thereon, and paid the fine and fees and charges thereunder, which he the Master had allowed to her in her account as thereafter mentioned. The Master then found, that Mrs. Priestly took proceedings at law to recover the mortgaged premises, and ultimately recovered judgment in ejectment (a); and that she entered into or took possession of the said mortgaged premises on the 7th December, 1827; and that there was due to her for principal and interest on her said mortgage when she so entered into possession the sum of 1420*l.* 18*s.* The Master then, after finding that Mrs. Priestly's taxed costs of the second and third suits had been paid by the defendant Yarde, a subsequent incumbrancer, found, that the mortgaged premises had been put up for sale under an order of the Court, and that the same with the timber had been sold for £3423, and the purchase-money paid into Court. And he further found, by the accounts which had been brought into the office by Mrs. Priestly and proceeded in before him, that, upon the balance thereof, and excluding therefrom several items which had been disallowed by him amounting to 286*l.* 11*s.* 3*d.*, there then remained due and owing from her (computing the interest up to the 1st August, 1839, when all principal was paid off by applying the surplus rents beyond the annual amount of interest in reduction of the principal from time to time remaining due, after giving credit for all rents and profits received by her to the time she gave up possession to the purchaser as aforesaid, and allowing the several payments and disbursements in respect of the said estate as in the said account mentioned) the sum of £413, the particulars whereof he had set forth in the schedule to his report.

The schedule, in an abridged form, was as follows:—

(a) See post, p. 398.

	£	s.	d.		£	s.	d.
Principal due on mortgage, all interest paid thereon to 1st August, 1818 . . . }	1000	0	0	Cash received by Mrs. Priestly of receiver, pursuant to order of 7th December, 1827 }	145	2	1
Interest thereon from the 1st August, 1818, to the 1st August, 1831, being 13 years, at 4l. 10s. per cent. per annum . . . }	585	0	0	Ditto	269	12	4
Paid fees and charges on administration . . . }	25	12	6	Ditto	297	13	5
Paid receiver costs of discharge	20	16	6	Half-a-year's rent of the tenant	68	18	9
	1631	9	0	Ditto, due Michaelmas, 1830	68	18	9
	850	5	4		850	5	4
Balance of principal due 1st August, 1831 . . . }	781	3	8				
One year's interest thereon to 1st August, 1832	35	3	1				
Rent to Michaelmas, 1831	816	6	9	One year's rent to Michaelmas, 1831	137	17	6
Balance of principal due 1st August, 1832 . . . }	137	17	6				
Balance of principal due 1st August, 1838 . . . }	678	9	3	* * * * *	68	18	9
One year's interest thereon to 1st August, 1839 . . . }	83	11	5	Half-a-year's rent, due Lady-day, 1838	68	18	9
	3	15	0	Ditto			
One year's rent to Michaelmas, 1838	87	6	5	Balance of rent due at Michaelmas, 1838, after payment of all principal and interest due to Mrs. Priestly	137	17	6
Balance carried to the other side	137	17	6	Half-a-year's rent due Lady-day, 1839	50	11	1
	50	11	1	* * * * *	68	18	9
				Ditto	68	18	9
				Deductions for receiver's charges and repairs Received by Mrs. P., after payment of all principal, interest, and costs, and to be refunded by her	464	3	7
					51	3	7
					413	0	0

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To this report Mrs. Priestly took exceptions, on the ground that it appeared by the report that the account had been taken with an allowance of annual rests, whereas it ought not, under the circumstances, to have been so taken; and, further, because such rests had not been directed by any order or decree of the Court.

The cause now came on for hearing on the exceptions, and also for further directions.

Mr. *Wigram* and Mr. *Calvert*, for the exceptions, contended, that, as there was a large arrear of interest due to Mrs. Priestly when she took possession, it was contrary to the whole course of authority to take the account with rests: *Davis v. May* (a), *Latter v. Dashwood* (b), *Wilson v. Chuer* (c), *Finch v. Brown* (d), *Wilson v. Metcalfe* (e): and that, at all events, it was not competent to the Master to take the account in that manner without express direction, and no such direction had been given in these causes: *Webber v. Hunt* (f).

Mr. *Simpkinson* and Mr. *Wilcock*, for subsequent incumbrancers.—The effect of the several orders is, that the three first sums mentioned in the schedule as having been received by Mrs. Priestly must be considered as received by her when she entered into possession. If so, there was, at that time, a balance of rent due from Mrs. Priestly. The first sum, 145*l.* 2*s.* 1*d.*, was in court on the 7th December, 1827, and was by the decree of that date ordered to be paid to Mrs. Priestly in *part* satisfaction of her debt. By the same

(a) 19 Ves. 383. For a succinct view of the circumstances under which the Court will direct a mortgagee's account to be taken with annual rests, and for some observations on the forms of decrees in regard to annual rests, see the judgment of Lord *Cottenham* in

Scholefield v. Ingham, C. P., Coop. 477. See, also, the cases mentioned in the notes to that case.

(b) 6 Sim. 462.

(c) 3 Beav. 136.

(d) Id. 70.

(e) 1 Russ. 530.

(f) 1 Madd. 13.

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decree the receiver was to pay the balance which should be found due from him in *further* satisfaction of the debt. Now, the balance subsequently found due from him to Lady-day, 1827, was 269*l.* 12*s.* 4*d.*, the second sum mentioned in the schedule. Debiting Mrs. Priestly with these two sums only, the arrears of interest due to her, upon taking possession, would be about five guineas ; but, taking into account the third sum, 297*l.* 13*s.* 5*d.*, her arrears would have been far more than amply satisfied. And the Master has taken this into account ; for, by the report of August, 1830, that sum is stated by him to have been received, and is found by him to be applicable to the purposes of the decree. Part of that sum must have been received for rent to Michaelmas, 1827. If such be the effect of the Master's findings, Mrs. Priestly cannot now say that these sums were not received by her on the 7th of December, 1827. The receiver was in possession at that time, and was her officer ; and the effect of the decree of the 16th of December, 1837, which adopts the prior orders and decrees, was to direct the Master to take the account of what was due for principal and interest at the date of the decree of the 7th of December, 1827, and not merely at the time of making his report : *Quarrell v. Beckford* (a), *Robinson v. Cumming* (b). [The *Vice-Chancellor*.—Does it appear from the book mentioned by the Master (c), that any part of the 297*l.* 13*s.* 5*d.* was received by the receiver in or before December, 1827?]

Mr. *Swanston* and Mr. *Terrell*, for other subsequent incumbrancers.—The decrees reduce the case to one point. That of 1827 directs the receiver to pass his account and pay the balance to Mrs. Priestly. It is clear, that he has done so. What Mrs. Priestly receives from the receiver under that decree must be considered as a receipt before she takes possession. The receiver was her agent under

(a) 1 Madd. 269.

(b) 2 Atk. 469.

(c) Ante, p. 388 ; it did not so appear.

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the decree ; and she has received so much, that the Court would, on further directions, decree the account to be taken with rests, or would direct an inquiry. This last remark (the cause being now heard on further directions, as well as exceptions) disposes of the objection as to the Master's jurisdiction.

Mr. Pigott, for other subsequent incumbrancers.

Mr. Moxon, for other parties.

Mr. Wigram, in the course of his reply, contended, that the decree of December, 1827, was in favour of Mrs. Priestly ; that the Master was not authorized, under that decree, to take an account of what was due for principal and interest at the date of the decree, but at the date of his report, and then it was to be ascertained at one gross sum without rests. The circumstance of a sum being due for rent at Michaelmas, 1827, would not assist the calculations on the other side, inasmuch as, throughout the whole account, an allowance had been made for one quarter's arrears of rent. With respect to the receiver, he was agent for all parties, and it was as much the duty of others as of Mrs. Priestly to compel him to pass his accounts. She took possession of necessity.

THE VICE-CHANCELLOR.—It is unnecessary to give an opinion upon the question, whether, in any view of the merits, it was competent to the Master, acting under the decree under which he was acting, to make the rests which he has made ; for the parties have all agreed to argue the question of rests as one of substance, and not of form, as the cause is now heard upon exceptions and further directions, and, without referring to the form of the decree of December, 1827, in that respect, it is agreed on all hands, that, if the Master had taken the account without rests, it

would be competent to the Court, upon the hearing for further directions, to order rests to be made.

Upon the merits, therefore, of the case, the first question is, whether, when this lady took possession of the property in question, there was an arrear of interest due to her. She must be deemed, for every substantial purpose of this cause, to have taken possession at the date of the decree of the 7th December, 1827. She had then a legal title, not only by judgment, but by a title which preceded that judgment. The discharge of the receiver on that day left the mortgaged property open to her possession; and although he did, in fact, continue after that day to perform his functions, not only as to the rent in arrear, but subsequent rents, this did not enable her, or any other person, to say, that she did not take possession at that time.

Now, upon the 7th December, 1827, arrears of interest for many years were due to her. It is not disputed, that, merely calculating the annual interest at £45, a sum exceeding £400 was on that account then due to her. It is said, however, that this cannot be considered the real amount then due, because the sum of 145*l.* 2*s.* 1*d.* was ordered by the decree to be paid to her; and that, although not actually received by her, yet, for any substantial purpose, it cannot be contended, that it was not so received. That observation is, probably, right; and to this extent (though it appears, that, in fact, the money was not received till a considerable time afterwards) I shall consider the amount due at the date of the decree as diminished.

The receiver was discharged, as I have said, on the 7th December, 1827, and it was then ordered that he should pay to her what should be found due on passing his account. It appears, also, that, in December, 1827, his account had not been passed for some time; that the account up to February, 1827, was not passed till 1830; and that the receipt to February, 1827, was 269*l.* 12*s.* 4*d.* Now, with-

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out positively deciding, I will assume that this sum ought to be considered as then received by Mrs. Priestly. That would nearly, but not quite, equal the arrear of interest due to her.

It is further urged, however, that, the account of February not having been passed until a subsequent time, and the balance upon that account, namely, 297*l.* 13*s.* 5*d.* having been received in 1830, that sum also ought to be considered as received in or before December, 1827, inasmuch as it included a half-year's rent due at Michaelmas 1827. I am of opinion, however, that it is impossible for me to treat any portion of the 297*l.* 13*s.* 5*d.* as actually or constructively in the hands of Mrs. Priestly when the decree of 1827 was made.

Assuming, as I have already said, but not deciding, that the 269*l.* 12*s.* 4*d.* ought to be taken as received by Mrs. Priestly on or before the 7th December, 1827, it would still leave her a creditor, by a few pounds, in respect of the interest of her mortgage. But it is to be considered that she had paid, at that time, 25*l.* 12*s.* 6*d.* for steward's fees and other charges upon admission; and, although that sum was expended for the purpose of the ejectment, it cannot be supposed that the Court meant to deprive her of it, especially as the Master has allowed it. I must, therefore, take into consideration this sum of 25*l.* 12*s.* 6*d.*, which would increase the arrears due to her to more than £30.

But that is not all: Mrs. Priestly had been engaged for years in a suit in which it appears that she was the party in the right, defending a mortgage that had been attacked upon insufficient grounds. During the whole of this time she must have been paying, by herself or her attorney in the suit, considerable sums of money. I must take into consideration the circumstances of herself or her attorney being obliged to make this outlay, which, at a late period, was adjudged to be paid to her by one of the parties. I must

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also take into consideration, that so many years of arrears were due to her, not by her own fault or choice, but by means of the assertion (ultimately proved to be wrong) of a title adverse to her, which, being not clear upon the mere statement of it, rendered it fit that the Court should withhold from her the rents till the question was decided. I must also further consider, that, in this state of things, the result not of her own acts, but those of her opponents, she was, without any harshness or vexation on her part, driven to place herself in the not very agreeable, and, in her circumstances, not very safe position of mortgagee in possession.

Now, thinking, as I do, that, both upon principle and authority, the mere fact of an arrear of interest being or not being due to the mortgagee, when the mortgagee takes possession, is not decisive upon the question of rests, but that every circumstance must be regarded—looking at all the accompanying circumstances—looking at the general right of a mortgagee not to be paid piecemeal, looking at the position to which Mrs. Priestly has been driven by the wrongful acts of the parties opposed to her, I think that she ought not to be compelled to have her account taken with rests.

With respect to the question, what interest, if any, ought to be paid by the mortgagee, from the time when the surplus rents had satisfied the amount of the principal money due, not being desirous of making any decision or laying down any general rule on the subject, I recommend the mortgagee to consent to be charged with interest at *£4 per cent.* (a) upon the balances in her hands since that time.

The counsel for Mrs. Priestly then consented, on the part of their client, to be charged with interest on the

(a) See *Quarrell v. Beckford*, 1 Madd. 285 ; *Lloyd v. Jones*, 12 Sim. 491.

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rents received, from the time when the surplus rent equalled the amount of principal, and, by consent, a sum of £165 was taken to be the amount of the arrears of rent and interest thereon.

The following were the minutes of the decree, as it affected this part of the case:—

DECLARE, that the account of Jane Priestly, as a mortgagee in possession, taken by the Master, ought not to have been taken with rests. Neither allow nor overrule the exceptions. Return the deposit. And the said Jane Priestly, by her counsel, consenting to be charged with the sum of £165, in satisfaction of all that is due from her in respect of the receipt of the rents and profits of the mortgaged premises, after allowing thereout what was due to her for principal, interest, and costs, other than such costs as are hereinafter provided for, and all parties by their counsel consenting, let her be charged with the same accordingly. Tax the said Jane Priestly her costs of these suits subsequent to the decree of the 9th December, 1827, and let her be at liberty to retain the amount thereout of the said sum of £165; and let her pay the balance, if any, after deducting such costs, into the Bank, with the privity of the accountant general, to the credit of these causes, the amount to be verified by affidavit; and in case the said £165 shall not be sufficient to satisfy such costs, let her be at liberty to retain the same in part satisfaction thereof.

The Court, under special circumstances, and considering itself bound by the terms of previous decrees, declined to give a mortgagee her costs of an ejectment brought to recover the mortgaged premises, in which she had, after much difficulty and opposition, recovered a verdict.

AN application was then made on behalf of Mrs. Priestly that she might, under the head of "just allowances," be reimbursed the sum of 286*l.* 1*l.* 3*d.*, being the amount of certain costs which had been incurred by her in proceedings at law to enforce her mortgage, and which had been disallowed by the Master. The Master found, that Mrs. Priestly, on the 20th May, 1820, commenced an action of ejectment against Thomas Smith to recover the possession of the mortgaged premises, when it was discovered that Smith had absconded subsequently to the service of the declaration in ejectment; and the premises were advertized for sale by auction on the 20th June, 1820, under the decree in the first-mentioned cause, which had been instituted by John

Horlock, a subsequent incumbrancer. That the solicitor of Mrs. Priestly attended the sale, and gave notice of her mortgage. That, in Michaelmas Term, 1820, John Horlock and Thomas Burford filed their bill in the second-mentioned cause, and on the 19th June, 1822, William Priestly and Jane his wife filed their bill in the third-mentioned cause, in which, and in the second-mentioned cause, an order was made on the 10th February, 1824, directing an ejectment to be brought by William Priestly and Jane his wife for the purpose of trying the legal right to the mortgaged premises. That, on the trial of such ejectment, Mrs. Priestly was nonsuited, not, as it was alleged, from any negligence on her part, but from the neglect or some error of the deputy steward of the manor not producing on the trial the deputation under which the mortgage surrender to her was taken. That a new trial was afterwards had on payment of the costs of the first trial, and that on such second trial a verdict was found for Mrs. Priestly, subject to a special case, which being afterwards argued in Easter Term, 1827, the verdict was confirmed. That Mrs. Priestly was paid her taxed costs at law in the said action of ejectment, and that she had also then claimed before him, the Master, the costs paid by her to the defendant's attorney of the first trial in the action of ejectment, amounting to £89, and also her own costs of the first trial in the same action, amounting to 107*l.* 10*s.* 3*d.*, and her costs taxed off in the said action, amounting to 90*l.* 1*s.*, making together 286*l.* 11*s.* 3*d.*, but which three several last-mentioned sums, amounting to 286*l.* 11*s.* 3*d.*, he the Master had thought fit to disallow in taking her mortgage account.

Mr. *Wigram*, in support of the application, said, that, in an account between mortgagor and mortgagee in this Court, the mortgagee was entitled to all costs incurred in

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fairly and reasonably maintaining his title at law: *Dryde v. Frost* (a), *Ellison v. Wright* (b); that there could be no decree to redeem Mrs. Priestly without making her just allowances; and that, if the former decrees omitted to provide for such allowances, it was not incumbent on the Court to abide by them.

The VICE-CHANCELLOR.—I am of opinion, that, if the attention of either of the judges who pronounced the decrees of 1827 and 1837 had been called to this point, they would probably have been decided in favour of Mrs. Priestly. But, considering that these costs were incurred before the decree of December, 1827, in proceedings at law, not between either of the parties to the suit in equity and stranger, but between two parties to the suit in equity, I think, that, while the decrees of 1827 and 1837 remain as they are, I cannot give them to her. Mrs. Priestly will consider, whether, having regard to her ultimate chance of success, and to the expense of possible inquiries relative to the proceedings at law, it will be probably for her interest to present a petition of re-hearing.

(a) 3 Myl. & Cr. 670.

(b) 3 Russ. 458.

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July 1st & 2nd.

IN October, 1836, certain negotiations took place between George Prickett, as the land-agent of the plaintiff Morgan Thomas, and Messrs. Gell, Fullagar, & Gell, as the solicitors and agents of the defendant Mary Blackman, for the purchase by the plaintiff of the defendant of a farm of about thirty-five acres, called the Horns Lodge Farm, situate in the parish of Mayfield, in the county of Sussex. These negotiations, however, ceased about the 17th of October.

On the 10th of December, 1836, the defendant's solicitors sent a letter of that date to Prickett in these terms:—
 "Sir,—The tenant of Miss Blackman's Horns Lodge Farm, in Mayfield, has written to us that some of the buildings have suffered a little from the late storm. The outlay for repairs would, probably, be very trifling, and might be altogether unnecessary if the farm were annexed to another. But Miss Blackman is so unwilling to lay out a sixpence, that, rather than do so, she authorizes us to offer it to Mr. Thomas at £650, paid clear of all expenses, or, what perhaps will be more agreeable to him, as more definite, for £660, subject, as to title, &c., to the conditions under which she purchased, which are copied on the other side. The price includes timber. We hope you will be able to give us an answer in the course of a week or ten days." The conditions referred to in this letter, and of which a copy was sent with it, were as follows:—"The sellers are to shew a good title for sixty years, and deliver an abstract of it at their own expense, but they shall not be required to shew an earlier title except at the expense of the person requiring the same. The purchasers are to pay the expenses of the conveyance of the freehold, and of the surrender of and admission to the copyholds, and for any copies and covenants for production of deeds, court-rolls, wills, surrenders,

Bill by a purchaser praying specific performance upon the terms of the vendor deducting a good title at her own expense, in the ordinary way, dismissed; the Court being of opinion, upon the construction of a series of letters, and upon the fact of the abstract of title having been delivered to the purchaser in the first instance, that the vendor entered into the negotiation only upon this footing, namely, that she should deliver an abstract of title, and verify it, so far as she had the means in her possession, at her own expense, but that the purchaser, if upon perusal of the abstract he were satisfied with the title, should be at the expense of completing its verification.

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or other documents of title not in the possession of the sellers, and for any assignments of satisfied terms that they may require ; and all recitals and averments in deeds more than twenty years old shall be considered conclusive evidence of the facts."

No answer was returned to this letter by Prickett, but, on the 27th of December, Mr. Triston, the plaintiff's solicitor, wrote to Mr. Fullagar in these terms :—" Sir,—As it would be Mr. Morgan Thomas's wish, on the event of his purchase from Miss Blackman, to be assured of the certainty of getting the tenant out at Michaelmas next, he wishes me to inquire into the nature of the terms between the tenant and landlord, as a preliminary question. Mr. Thomas does not feel disposed to waive the usual title as a purchaser he could require."

In reply to this letter, on the 30th of December, Mr. Fullagar wrote to Mr. Triston in these terms :—" Sir,—Miss Blackman's tenant of Horns Lodge Farm, in Mayfield, holds under a written agreement by the year from Michaelmas, determinable by six months' notice on either side. There can be no difficulty as to his quitting, if notice be given before Lady-day. The rent is £25, and the covenants such as are usual in that part of the country. I hardly understand your concluding observations respecting the title. I believe it is perfectly unexceptionable ; *but the conditions, copied in my letter to Mr. Prickett, restrict the expense to which the seller is to be subject, and such conditions you will find not unusual.*"

On the 7th of January, 1837, Mr. Triston wrote to Mr. Fullagar as follows :—" Sir,—I have communicated with Mr. Morgan Thomas on your favour, and he desires me to say, *he cannot dispense with the proper title a purchaser can require*, and will of course pay such expenses as will fall on him in that capacity. He has no objection to proceed with the treaty on these terms, on being satisfied the present tenant can be gotten rid of by next Michaelmas."

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The rest of the correspondence proceeded as follows:—

25th January. Gell & Fullagar to Triston.—"Sir,—Mr. Fullagar having been prevented from going to London last week as he had anticipated, we now send you the abstract of Miss Blackman's title to her little farm in Mayfield,

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which, if you please, you can cast your eye over, and *then decide whether Mr. Thomas will purchase on the terms we offer*. We believe you will find the title more than usually simple, and we have mentioned in the margin what documents are in our hands, which will be delivered to the purchaser. Mr. Fullagar may possibly be in town at the end of next week, and, if so, he will have the pleasure of calling on you. Should the treaty not proceed, of course you will return us the abstract."

11th March. Fullagar to Triston.—"Are you proceeding with Mr. Thomas's purchase of Horns Lodge Farm of Miss Blackman? I was in hopes we might have settled it at Lady-day."

23rd March. Triston to Fullagar.—"I apologize very sincerely to you for not replying earlier to your favour, but the fact is, I could not give you any decided answer before on the subject of Mr. Thomas's proposed purchase of your client; and from Mr. Thomas being, as you are aware, ill, and at Bath, and Mr. Prickett and myself having been for several weeks past in different parts, I could not till this day bring the matter at all to a point. I am now able to state, Mr. Thomas will agree to the conditions of your letter to me of the 17th January last, except that he will take the rent from Lady-day next, and will pay interest at *£4 per cent.* from that day, instead of your condition in that respect; *and you must add to your condition the one you originally proposed to Mr. Prickett*, that the vendors are to make out a good title for sixty years, but not earlier, except at the expense of the person requiring the same. I trust, therefore, you will take care to give the tenant proper notice to quit at Michaelmas-day next, which Mr. Thomas makes, as you know, a *sine quâ non* matter, and which you will have time, on the receipt of this letter, to give. In the uncertainty attending this business, I had not taken any further step in it beyond a cursory perusal of the abstract on my own

part. Now, if it is to go on, I must lay it before our conveyancer; but I should like to hear from you first in reply to this letter, and whether you could answer for examination of the deeds in town with it first, or whether I may defer this to a subsequent period, and in the interim lay it before counsel."

28th March. Gell & Fullagar to Triston.—“Previously to the receipt of your letter of the 23rd instant, we had given the tenant of Horns Lodge Farm notice to quit at Michaelmas next. We may probably be in town about the beginning of Easter Term, and will take the opportunity of bringing you the title-deeds, or, if we are disappointed in this, we will send them to our agent for your inspection. We have no copy of the abstract we sent you, and we forget its commencement; but we have no doubt that, on inspection of the deeds, this will be satisfactory to you."

12th April. Triston & Hardy to Gell & Fullagar.—“We have laid this abstract before our conveyancer, whose opinion we send you. His requisitions are the following,” &c. [The requisitions were set out.]

5th May. Same to same. Letter requesting an answer to the former letter.

15th May. Gell & Fullagar to Triston.—“We have not answered your letter of the 12th of April and the 5th instant sooner, because we were in expectation of seeing you. We have a copy of the abstract sent you, but we think it most probable that an examination of the deeds will afford satisfactory answers to your observations. We will take these deeds to our agent’s on Thursday next, where you may examine them. Mr. Fullagar will have the pleasure of calling on you on Friday afternoon.”

23rd May. Fullagar to Triston.—“I find I shall be in town, most probably, on Saturday or Monday next. Is it not possible for us to settle the conveyance from Miss Blackman to Mr. Thomas on that occasion? There can,

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I should presume, be no matter for discussion on the drafts." * * *

26th May. Triston & Hardy to Gell & Fullagar.—
“ We did not till yesterday evening (too late to send you get from our conveyancer the abstract, with his opinion on your answers to his former queries. We particularly direct your attention to his further opinion, and we will expedite the matter as much as possible when it can be done, for you will perceive the impossibility of our being able to do so, so as to meet Mr. Fullagar’s requisition contained in his favour of the 28th instant. You will see the further opinion below.”

7th June. Fullagar to Triston.—“ I have no copy of the abstract of Miss Blackman’s title, and I left the deed with my agent in town. I am obliged, therefore, to rely on memory in answering the further observations of your counsel contained in your letter of the 26th ult. All the certificates alluded to by Mr. White may be obtained and you may see in the parish-registers entries of all burials, &c. which we have stated in the abstract. But the seller has no certificates, and is protected by the terms of our contract from the expense of procuring them. The same observation applies to official extracts of probate acts. We have no means of shewing the earlier title to the trifling copyhold land, without incurring expense in resorting to and obtaining extracts from court-rolls, which if you require it, we will willingly do, *but at the expense of the purchaser.*”

15th July. Same to same. Letter containing answer to the queries in the last-mentioned opinion, and comprehending also the following remarks:—“ We fully admit the right of the purchaser to call, if he think necessary, for a sixty years’ title to the trifling copyhold. This may be easily obtained from the steward of the manor, but we will not incur the expense on the part of the seller, and I think you will not consider this an ob-

jection. We will thank you to send us back the abstract, for we have no copy, and the deeds are at our agent's, and we therefore write from recollection only of the title."

5th August. Triston & Hardy to Gell & Fullagar.—
"The delay is becoming of consequence to Mr. Thomas, on account of the arrangements for re-letting the place being necessarily kept open until the purchase is completed, and his money has been ready for a considerable time for the same event."

23rd August. Same to same.—"If Mr. Thomas be prevented from re-letting the property by your delay in perfecting the title, he will, of course, expect to be compensated for the injury he will sustain."

Same day. Fullagar to Triston.—"The intention of my letters of the 17th and 25th January last clearly was, that the negotiation should proceed only on your being satisfied with the title and the documents to be delivered to the purchaser, as disclosed by the abstract then sent for your perusal. The purchase for the estate being fixed in contemplation of a very limited expense on the part of the seller, I can now only say, that, if you are not perfectly satisfied to allow Mr. Thomas to complete the purchase on the title as it is, we do not wish, on the part of Miss Blackman, to require it, and she will consider the treaty at an end, but she will not incur any further expense about it."

28th August. Triston & Hardy to Fullagar.—"We must, on behalf of Mr. Thomas, insist on your client's compliance with the conditions of sale," &c.

The bill, suppressing the letter of the 10th December, 1836, and alleging that the conditions of sale, as sent with that letter, were delivered by the defendant's solicitors to Prickett in October, 1836, charged, that, by means of the conditions of sale so delivered, and of the several letters of the 17th January, 1837, the 11th March, 1837, the 23rd March, 1837, and the 28th March, 1837, the defendant agreed to sell, and the plaintiff agreed to purchase, the

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Horns Lodge Farm for the sum of £660, upon the terms and conditions contained in those conditions of sale and letters. And the bill, after charging, that the defendant was bound, at her own expense, to adduce a good title to the premises, and that it never was intended on the part of the plaintiff that he should be at the expense of deducing the same, or procuring the necessary evidence and documents for that purpose, prayed specific performance of the agreement as stated in the bill.

The defendant, by her answer, after setting forth the letter of the 10th December, 1836, and denying that the conditions of sale, as sent with it, had been delivered in the previous October, stated, that the proposal contained in that letter was never accepted by the plaintiff; that she afterwards in order to avoid the expense of making out a title as in ordinary cases a purchaser might require, made a new proposal to the plaintiff, namely, that which was contained in the letter of the 17th January, 1837; that, except by the letter of the plaintiff's solicitor dated the 23rd March, 1837, such new proposal or offer was not in any manner accepted by the plaintiff; that, on the other hand, the new terms contained in the letter of the 23rd March were never agreed to by or on behalf of the defendant; but that her solicitor afterwards proceeded in making out the title, as deduced by the abstract, upon the footing of the terms contained in the letter of the 17th January, and in the belief that such terms had been or would be accepted. She further stated, that it never was intended by her, or on her behalf, that she should be put to any further expense in deducing the title than by the delivery of the abstract, and the verification thereof, so far as it was in her power, by the production of documents in her power. She submitted, whether any agreement was ever come to between her and the plaintiff, and relied on the Statute of Frauds.

The cause now came on for hearing.

Evidence at considerable length was read for the plain-

tiff, but it consisted principally of proofs of the letters and documents mentioned in the bill. In the course of his examination for the plaintiff, Mr. Prickett proved the letter of the 10th of December, 1836, and that, some time after his receipt of it, (though when he could not state), he handed it over to Mr. Triston. No proof was offered of the allegation in the bill as to the delivering of the conditions of sale to Prickett in October, 1836.

The defendant entered into no evidence.

Mr. *Russell* and Mr. *Tillotson*, for the plaintiff.

Mr. *Teed* and Mr. *Goodeve*, for the defendant.

The following cases were referred to :—*Huddleston v. Briscoe* (a), *Stratford v. Bosworth* (b), *Ogilvie v. Foljambe* (c), *Kennedy v. Lee* (d), *Holland v. Eyre* (e), *Price v. Assheton* (f), *Hyde v. Wrench* (g).

The VICE-CHANCELLOR, after reading and commenting on the letters of the 10th December, 1836, the 27th of December, 1836, and the 30th of December, 1836, and after observing that the plaintiff must be taken, when Mr. Triston wrote the letter of the 27th of December, to have known of the letter of the 10th of December, proceeded to remark, that it appeared from the letter of the 17th of January, 1837, that the repeated reference in the letters of the plaintiff's solicitor to the title of the property had naturally enough alarmed the defendant's solicitor, and he accordingly offered to produce an abstract of title. That letter, however, was evidently written by a person who

(a) 11 Ves. 583.

(b) 2 Ves. & B. 341.

(c) 3 Mer. 53.

(d) Id. 441.

(e) 2 Sim. & St. 194.

(f) 1 Y. & C. 441.

(g) 3 Beav. 334.

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thought that there was no doubt as to the title, and that upon producing the abstract, there would be no difficulty in satisfying the plaintiff. "Looking," said his Honor "at the position of the parties, the expressions of that letter clearly indicate what was passing in the mind of the writer, namely, an intention not to *make* a good title, but to *shew* a good title. He says—'As you appear to have imbibed an apprehension as to the title, for which I believe there is no foundation, I will bring the abstract down on Friday next for your perusal, and if afterwards—that is to say, if after perusal—' Mr. Thomas is inclined to purchase at the terms we offer, we shall be happy to communicate on the subject with you; if not, you will please to return us the abstract and consider the treaty at an end.' Now, it is not a usual course for a purchaser to read the abstract before there is any contract; and here, I apprehend, it is clear that the writer supposed that if the plaintiff bought at all, he would buy upon the title shewn and be content with it."

Then follows the letter of the defendant's solicitor of the 25th of January. All February and part of March passed without any letter from the plaintiff or his agents. On the 11th of March the defendant's solicitor writes to inquire whether the plaintiff is proceeding with his purchase; adding—"I was in hopes we might have settled it at Lady day." On the 23rd of March, and not till then, the plaintiff's solicitor wrote an answer to the letters of the 17th and 25th of January.

So long a time had elapsed between the defendant's offer, contained in the letter of the 17th of January, and the plaintiff's answer of the 23rd of March, that, had the latter been a simple acceptance of the offer, I should probably have been disposed to think that the time for acceptance had passed. But I am of opinion that it was not a simple acceptance. The plaintiff's solicitor himself treat-

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it as containing an addition to, or variation from, the terms offered by the defendant. Besides, having regard to the date of the letter and the language of the correspondence, it may be a question whether the expression "Lady-day next," does not refer to Lady-day in the ensuing year. It can hardly be supposed that the contract was to be concluded in forty-eight hours. Then the writer, in mentioning the abstract, takes care not to be bound by the perusal of it, but speaks only of laying it before his conveyancer; and he concludes with the words—"but I should like to hear," &c. Far from containing a simple acceptance of the defendant's offer, I am of opinion, that of every feature that ought to belong to an acceptance, this letter is deprived.

Then follows a letter of the defendant's solicitors, in which occurs a material passage:—"We have no copy of the abstract we sent you, and we forget its commencement," &c. Why use the phrase "forget its commencement" &c.? In my opinion, because the impression existing in their minds was, that there was no contract unless the purchaser, upon reading the abstract, was satisfied with that abstract. Now, it is said, that this letter was itself an acceptance of the varied terms of the letter of the 23rd of March. I am of opinion that it would be unsafe so to hold it. There is an absolute silence upon the question of acceptance or non-acceptance: and those who have to read this correspondence must bear in mind throughout, that the abstract was delivered before any contract at all, —a matter without the remembrance of which it is impossible soundly to interpret all the letters. Then follows the communication of the conveyancer's first opinion. He says, that the title to the copyhold property must be carried back for the usual period of sixty years. I think that he was right, because, though there were only two acres of copyhold, yet that was for the parties and not for their

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counsel to consider. I pause, however, upon that objection of the conveyancer, because it seems to me to go to the root of the matter." [The *Vice-Chancellor* then read the letters of the 5th, 15th, 23rd, and 26th of May, and the 7th of June and 15th of July, observing, that the letters on the side of the vendor were generally to the effect that the purchaser was at liberty to accept the title or to reject it, and to call for any evidence he pleased, but none from the vendor. His Honor then read the letters of the 23rd of August, and proceeded as follows:—]

I am told that this is a case for compelling specific performance upon the terms of treating the defendant bound to make out a marketable title. The correspondence, however, does not make that impression upon my mind. I agree, or for the purpose of the argument assume that, whatever may be believed to have been Mr. Fullagar's intention in using the language which he did use, yet, if that language is fairly susceptible of such a construction as has been put upon it by the purchaser, the vendor must be bound by the language, and not by Mr. Fullagar's interpretation of it. But I am of opinion, that the language conveys, and was intended to convey, the meaning ascribed to it by Mr. Fullagar; and, if I believe that to have been the vendor's meaning intelligibly expressed, how can this be a case for specific performance upon the terms insisted on by the purchaser? I think that it is not; and that in truth there never has been, (give it what interpretation you will), in any part of the correspondence, a clear accession on both sides to one and the same set of terms. When I add the consideration, (which, though not so important, is not to be overlooked), that this is a small purchase, to an amount only between £600 and £700, which has been in dispute ever since 1836 or 1837; that though the only evidence, or the only evidence worth any thing is a set of letters which might have been admitted without

difficulty, the bill filed in December, 1838, is not brought to a hearing till the summer of 1844—upon a demand, under such circumstances, for specific performance, whether there is or is not a case upon which an action could be sustained at law, I am of opinion that the Court ought to be neutral. Therefore, the defendant having undertaken to sell the property to the plaintiff, if he wishes it, at £660, upon the terms of his being satisfied with the title as she took it, if the plaintiff declines that offer, the bill must be dismissed,—a result which will be quite consistent with the expressions of Lord *Eldon* in *Kennedy v. Lee*.

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BILL dismissed; costs subsequent to the answer to be paid by the plaintiff. *July 27th.*

ATTORNEY-GENERAL v. SEVERNE.

July 3rd.

ON the 18th of October, 1842, Thomas Herbert Severne and Mary Ann Crocome, both being infants under the age of twenty-one, and resident at Derby, were married by license at the parish church of St. Peter, Nottingham. The husband was entitled, under the will of his father, to a fortune of about £6000, upon his attaining the age of twenty-one.

Upon an information under the Marriage Act against A. and B., minors, to enforce a forfeiture in respect of a fraudulent procurement of marriage by B. with A., it was proved that A. and B., being minors, were married by license on a certain day at a

By the 14th section of stat. 4 Geo. 4, c. 76, it is enacted, for avoiding all fraud and collusion in obtaining licenses for marriage, that, before any such license be granted, one of

certain place, B. being aware that A. was a minor, and that, on the same day and at the same place, an affidavit was made by a person represented to be B., to the effect that A. was of the age of twenty-one. The Court gave the relator liberty to exhibit an interrogatory for the purpose of identifying the defendant B. with the party who made the affidavit.

In order to sustain an information under the 23rd section of the Marriage Act, a false affidavit that a party is of full age is equivalent to a false affidavit that the necessary consent to a minor's marriage has been obtained.

In order to sustain such an information, it is not necessary to shew that the minor, with whom the marriage was procured, was entitled at the time of the marriage to any property, either in possession, reversion, remainder, or expectancy.

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the parties shall personally swear before the surrogate, or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any Ecclesiastical Court to bar or hinder the proceeding of the said matrimony, according to the tenor of the said license; * * * * and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of the act, has been obtained thereto.

The 16th section specifies the persons who are to give their consent to the marriage where either party is a minor, and not a widower or widow, namely, the father, or, in case of his death, the guardian lawfully appointed, or if there shall be no such guardian, the mother, if unmarried, or if the mother be married, the guardian of the person appointed by the Court of Chancery.

The 23rd section enacts, that, if any valid marriage, solemnized by license, shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under twenty-one, not being a widower or widow, contrary to the provisions of the act, by means of such party falsely swearing as to any matter or matters to which such party is thereinbefore required personally to swear, such party wilfully and knowingly so swearing, it shall be lawful for the Attorney-General, by information in the nature of an English bill in the Court of Chancery, at the relation of a parent or guardian of the minor whose consent has not been given to such marriage, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage; and such Court shall have power in such suit to declare such forfeiture, &c.

The present information was filed against Thomas Her-

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bert Severne and his wife, at the relation of the husband's mother and guardian, Louisa Severne. After alleging that the marriage was procured by the female defendant, the defendant Thomas Herbert Severne being under twenty-one, and a bachelor, contrary to the provisions of the act, by means of her falsely swearing that the other defendant was of the age of twenty-one years and upwards, and that she wilfully and knowingly so swore, the information prayed that it might be declared, that the wife, having offended as aforesaid, contrary to the provisions of the act, had forfeited all estate, right, title, and interest in any property which had accrued, or should accrue to her by force of the marriage, and that all proper directions might be given by the Court for securing all such estate, right, title, and interest, for the benefit of the husband and the issue of the marriage, or some of them, in such manner as the Court should think fit, for the purpose of preventing the wife from having any interest in the real or personal estate, or any pecuniary benefit from the marriage.

Upon the information coming on for hearing, the following document, which was sworn to be a true copy of a document filed in the Archidiaconal Court of Nottingham, was read on the part of the relator:—"18th October, 1842. On which day appeared personally Mary Ann Crocome, of the parish of St. Peter, in the town of Nottingham, and alleged and made oath that she is of the age of twenty-one years and upwards, and a spinster, and that she intends to marry Thomas Herbert Severne, of the parish of St. Peter, in the borough of Derby, and that he is of the age of twenty-one years and upwards, and a bachelor, and that she believes there is no let or impediment by reason of any pre-contract, kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical Court to bar or hinder the proceeding of the said matrimony; and she prayed license, &c.; and she made oath that the usual place of abode of

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her, the said Mary Ann Crocome, hath been, for the space of fifteen days immediately before the date hereof, in the parish of St. Peter, in the town of Nottingham."

There was no evidence to shew that Mary Ann Crocome named in this document was the same person as the defendant Mary Ann Severne.

The evidence that Mary Ann Severne knew that her husband was a minor when she married, consisted of statements sworn to have been made by her in a conversation which was not put in issue by the pleadings.

Mr. *Swanston* and Mr. *Smythe*, in support of the information, cited the *Attorney-General v. Mulla* (a).

Mr. *Wigram* and Mr. *Daniel*, for the defendants.—Infancy is not an impediment within the 14th section of the statute, and therefore the oath, if taken, was not in contravention of anything contained in that section. The case of *Attorney-General v. Mulla* was not decided on this point. The information must be dismissed on the ground that any decree which may be made by this Court will be nugatory. If the husband attains twenty-one he will take a vested interest in the property, and can will it to the wife, and a declaration of forfeiture in this suit will not deprive her of it. If he attains that age and dies intestate the wife will take a share of the property under the statute of distributions; but in such case her interest will not properly arise "by force of such marriage." If he die under twenty-one, every thing goes from him. There being, therefore, no property in question, this Court has no jurisdiction. The object of the Marriage Act was not to transfer to this Court the powers of the Ecclesiastical Court to censure the parties. Besides, if there be no sufficient evidence to sustain the information, none ought to

(a) 4 Russ. 329.

be supplied. The case of *Marten v. Whichelo* (a) is important as affecting the practice of the Court in this respect, even if this were an ordinary suit in equity. Here every thing turns on the taking of a false oath. Unless, therefore, a false oath be proved against one or other of these defendants, the relator has no right to a decree. Now, it is not proved that the false oath alleged to have been taken, was taken by the defendant Mary Ann Severne, or that if she took it she knew the contrary of the statement to be true. And this being a case of a highly penal nature, the Court will grant no indulgence to the relator: *Attorney-General v. Lucas* (b). Besides, the surrogate had no authority to administer the oath in any other form than that required by the act. Suppose it were to turn out upon inquiry, that a false oath had been taken, still it would not have been taken as to matter to which the party was "thereinbefore required personally to swear." The information, therefore, could not be sustained in respect of a false affidavit taken under such circumstances. *Rex v. Foster* (c).

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Mr. Swanston, in reply.

THE VICE-CHANCELLOR.—When evidence to a certain extent has been given in support of the case of a complainant or informant in equity, but which is not, in the view of the Court, sufficient at the hearing, and the Court sees that there is moral certainty or reasonable probability that evidence can be added, it is within the discretion of the Court, regard being had to the circumstances of the particular case, to determine whether an opportunity should be afforded to the parties of adducing further evidence. It cannot be said here that the parties are without evidence.

(a) Cr. & Ph. 257.

(b) 2 Hare, 566.

(c) Russ. & Ry. 459.

1446
 1447
 1448

The point to be established is, that a marriage by license took place between two minors, by means of an affidavit the wife swore the marriage that her husband was not minor, the contrary. Now, it is satisfied that a marriage took place by license between two minors: it could not have taken place without some affidavit. There is no proof or suggestion any affidavit being made except one; and it is stated that in the registry of the Archidiaconal Court Nottingham, where the person who solemnized the marriage appears to have been a surrogate, there is a paper purporting to be an affidavit made with a view to the marriage, and to be the affidavit of this young woman, which I think it is. There is no proof of identity, but it is probable to say in more than it is the affidavit the person it was made is supposed to have been made. No affidavit is made on the 11th of October, and the marriage took place on the same day. By license, the rectifying the surrogate. Considering these facts, the plan in which the affidavit is made that there is no suggestion in any other affidavit. It would be monstrous to say that there is not some evidence to show that this affidavit was made by the person in question: and I answered to him, that if the parties had been adults, as the case had involved in question of criminality, but he had never said, I should have had the evidence submitted without my opinion. It is then said that there is evidence that the party knew the contrary of the statement in her affidavit. There is some evidence that she did it purposely, however, if a conversation proved by her that it was in the morning. That is argued in the proceedings, but for not making the party satisfied by a witness offering her an opportunity of producing other evidence. Now, is the object of this act of Parliament was the public interest, and is in the interests of the law as they are made more than a year in

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elapsed since the marriage,—under these circumstances, supposing that the case, if proved, would be within the act, I think that it would be a miscarriage, if I were not to direct an inquiry. It is said, however, that this case is not within the act, as the husband has no property in possession, and will lose everything if he dies under twenty-one. The case cannot be put stronger for that argument than by supposing that he had and has no property in possession, reversion, remainder, or contingency. It would be, nevertheless, within the act of Parliament, which uses the words “all estate, right, title, and interest in any property which hath accrued, or shall accrue, to the party so offending, by force of such marriage.” And although it is urged that no property which can hereafter devolve upon the husband can be property in respect of which the wife could acquire an interest “by force of the marriage,” yet I can conceive cases in which that might occur. Assuming, therefore, that the husband had no property, the case is not taken out of the act.

Then it is contended, that there has been no contravention of the act, by reason of the particular language of the 23rd section. There being a provision that, where either of the parties shall be under twenty-one years of age, a particular statement shall be made, the case supposed is, that, in order to avoid making the statement, the party includes in her affidavit falsely that which makes the statement unnecessary, and I am asked to hold such an affidavit not to be a false affidavit within the act. If I were so to construe this act, I think that I ought not to attempt to construe another.

•
 ENTER the evidence as read, and, by consent, let the evidence taken under the eighth interrogatory be expunged. Let the cause stand over, and the relator be at liberty to exhibit an interrogatory, for the purpose of proving that the marriage solemnized by license between the defendants, in the parish church of St. Peter, Nottingham, on the 18th October,

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1842, was procured by the female defendant, by means of her swearing that on that day the other defendant was of the age of one year, or of the age of twenty-one years and upwards, and that she wilfully and knowingly so swore. Leave to the defendant to exhibit any interrogatory or interrogatories to disprove that fact.

July 3rd &
4th.

Upon the construction of a will:—*Held*, that the residue of the testator's personal estate devolved to his cousins german, living at his death, except that the issue of any cousin, dying between the date of the will and the death, took the prospective share of the parent.

Upon the construction of the same will the share of a cousin, dying without issue between the date of the will and the death of the testator, was held not to have lapsed, but to have fallen into the bequeathed residue.

CORT v. WINDER.

ARTHUR ARMISTEAD, by his will, dated the 11th November, 1832, after giving various legacies and directing that all the residue of his real and personal estate should be sold and converted into money, and that his trustees therein named should stand possessed of the whole of the residue of the money so to arise from the sale of his real and personal estate, upon trust, in the first place to secure the several annuities, and subject thereto, to pay the same in trust for all and every of my first cousins german, divided equally amongst them share and share alike, to whom I give and bequeath the same: and in case my said cousins shall depart this life before their respective shares of the residue of my monies and persons shall become due or payable, leaving any lawful issue or them surviving, I direct that such issue shall be entitled to the same share or shares of the same and monies as his, her, or their parent or parent have been entitled to if living."

The testator died in May, 1837.

By an order made in this cause by *The Vice-Chancellor of England*, bearing date the 15th February, 1844, referred to the Master to inquire and state whether the cousins german of the testator were living at the date of the testator's will, and whether any and which of them had died in the lifetime of the testator, leaving any lawful issue.

The Master, by his report, after finding who were the first cousins german of the testator living at the date of his will, found that only two of them died after the date of the testator's will and in his lifetime, namely, John Howson and Arthur Cox Edmondson, and that the former died without issue, and the latter left seven children surviving him.

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The question now argued was, who was entitled to the shares of the two cousins who died in the testator's lifetime.

Mr. *Temple* and Mr. *Freeling*, for the children of Arthur Cox Edmondson, contended, that those children were entitled to the share which their father would have taken, if he had survived the testator. They cited *Smith v. Smith* (a), and *Gibbs v. Tait* (b).

Mr. *Spence*, Mr. *Russell*, Mr. *Bellamy*, Mr. *Bacon*, Mr. *Daniel*, Mr. *Collyer*, Mr. *Mylne*, Mr. *Cankrien*, Mr. *Rasch*, Mr. *Phillips*, and Mr. *Terrell* appeared for the various other parties.

In the course of the argument, the case of *Greaves v. Shuttleworth* (c) was referred to, as shewing that the representatives of John Howson were not entitled to his share, but that the whole vested in the surviving cousins and the issue of such as died after the date of the will.

The VICE-CHANCELLOR.—It seems plain, upon this will, that the testator meant the same persons to take the whole of the residue, and not one class to take one part, and another a different portion. I think that the words "due or payable" are referable to the time of the testator's death, and that the share of the cousin german dying in

(a) 8 Sim. 353.

(b) Id. 132.

(c) 4 M. & Cr. 35.

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the testator's lifetime who left issue belongs to his issue. That introduces a difficulty as to John Howson's share, but I think I may decide that there is no lapse as to share, and that it falls into the mass.

On the following day, Mr. *Phillips*, who appeared for the testator's widow and contended that both shares had lapsed, referred to *Gray v. Garman* (a), *Christopherson v. Naylor* and *Viner v. Francis* (c).

THE VICE CHANCELLOR (after referring to *Tytherle v. Harbin* (d)).—My impression remains, that the testator here intended the whole of the shares in the residue to go to the same class of persons, the right to them to be ascertained at the same time, and that there should be no breach or difference of division. I think that the words "due and payable," which are words susceptible of a variety of interpretations according to the context of the instrument in which they are found, ought in this will to be construed as having reference to the death of the testator; although it has been said to be difficult, or apparently difficult, to reconcile with that construction the sort of interpretation adopted in *Viner v. Francis*, and other cases of that kind which attribute this class-description to persons who represent the class at the time of the death. It has been said also that, if the construction which I consider to be the correct one be adopted, the effect must be to thwart the word "said," which, it is contended, is used in the will with reference to the cousins individually. But I am of opinion that this word is not of necessity, even literally, in the way. The testator has in the first instance used the words "my cousins german:" he afterwards says, "and said cousins." That may as well apply to cousins of the

(a) 2 Hare, 268.
 (b) 1 Mer. 320.

(c) 2 Cox, 190.
 (d) 6 Sim. 329.

class before mentioned as to individuals. I think it may be read either way. No will, however, can be properly interpreted by taking its clauses separately; the whole must be read in order to obtain a just interpretation. And, doing so here, I think that the testator meant all his first cousins living at his death to take, with this single exception, that, if any of his first cousins, living at the date of his will, or born after its date, should die in his (the testator's) lifetime, leaving issue, then the share of the person so dying should go to his issue.

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HEARN v. WELLS.

July 4th & 6th.

THE Rev. Joseph Wells, by his will, dated in May, 1816, after giving various legacies and devising certain real estates, gave and devised his estates at Great Kimble, Little Kimble, and Ellesborough, in the county of Bucks, to Kender Mason and Thomas Hearn and their heirs, to the use of the testator's wife, Mary Anne Wells, for life, with remainder to the testator's four sisters for their respective lives, with remainder to the testator's kinsman, Fleetwood Wells, for his life, with remainder to the first and other

Testator by his will gives the rents of his real property to his wife for life, and bequeaths the bulk of his personal property to her absolutely, constituting her sole executrix; and directs that certain trustees shall, as soon as conveniently

may be after his decease, convert all the convertible residue of his personal estate into money, and invest it in Government or real securities, and pay the dividends to his wife for life. The ultimate trusts both of the real and residuary personal property are in favour of persons who are not in esse, or not ascertained. Twenty years elapse, during which the trustees leave the widow in the possession and management of the whole property, and then the surviving trustee files a bill against her for an account. It appears in the suit that she has paid all the testator's debts to an amount exceeding the amount of personalty not specifically bequeathed, but that she has left some of the assets outstanding, and claims to be a purchaser of those assets, in part satisfaction of the monies which she has overpaid:—*Held*, that, whatever might be her right at law as a purchaser of those assets upon a plea of *plenè administravit*, her right as a purchaser in equity is not absolute, but subject to the rules of equitable administration, and consequently that, the bill being filed on reasonable grounds, the surviving trustee is entitled to the costs of the suit; but:—*Held*, under the circumstances of the case, that he is not entitled to costs as between solicitor and client.

Seemle, that a mortgage for years, of which a testator has been in possession for upwards of twenty years, without receiving interest, and without any claim being made in respect of the equity of redemption, ought in the administration of assets to be considered as leasehold.

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sons of Fleetwood Wells severally and successively in tail male, and in default of such issue, to certain uses in favour of such male person or persons as at the time of the death of Fleetwood Wells should be nearest related to the testator by the whole blood. And as for and concerning all the rest, residue, and remainder of his goods, chattels and personal estate, whatsoever and wheresoever, and of what nature or kind soever not thereinbefore by him bequeathed, the testator gave and bequeathed the same and every part thereof, subject to the payment of his just debts and legacies and his funeral and testamentary expenses unto the said Kender Mason and Thomas Hearn, their executors, administrators, and assigns, upon trust, that his said trustees, or the survivor of them &c., should, with all convenient speed after his decease, sell and dispose of and convert into money such part of the said residue as should not at the time of his decease consist of stocks or funds, or be invested upon eligible real security, and should lay out and invest the monies which should be produced by such sale and conversion in the parliamentary stocks or funds of Great Britain, or at interest on government or real securities in England, in the names or name of the said trustees, with power to vary the securities and should stand possessed of and interested in the said residue upon trust, to pay the interest, dividends, and annual produce to Mary Anne Wells for life, then to Fleetwood Wells for his life, and after the death of the survivor of them, upon certain trusts for the benefit of the male issue of Fleetwood Wells, and in default of male issue living at his death, in trust for such person or persons as under or by virtue of his said will should become entitled to the ultimate remainder in fee-simple of and in his said real estates situate in Great Kimble, Little Kimble, and Ellesborough.

By a codicil, dated in May, 1816, the testator devised certain other estates to the same uses as were declared in his will concerning the estates before mentioned, and after

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devising certain real estates in Devonshire to his wife, absolutely gave and bequeathed unto and for the absolute and only use, benefit, and disposition of his said wife Mary Anne Wells all his goods, chattels, and personal estate within the county of Devon at the time of his decease, requesting, however, but not directing, that his said wife Mary Anne Wells should dispose of his said personal estate at her decease, to and for the benefit of the person or persons who under his will might be then entitled to his real estate in Bucks.

By a subsequent codicil the testator appointed his wife to be his sole executrix.

The testator died in March, 1818, and in the following July his widow proved the will. She duly paid all his debts, funeral and testamentary expenses, and legacies, and being tenant for life of all the real and personal estate of the testator, was left in full possession of them by the trustees, who, except as after mentioned, never attempted to execute the trusts of the will.

On the 15th of August, 1829, Mr. Hearn, who had survived his co-trustee, and who was a solicitor, wrote a letter of that date to Mrs. Wells, in which was the following passage:—"On looking into the will of my late friend Dr. Wells, I perceive that in a certain event, (far distant I trust), considerable responsibility will devolve upon me as the surviving trustee in respect of the personal estate, and of which personal estate I am not aware that I have the least account whatever. As you, no doubt, have some statement of it, I am sure you will excuse my asking for a copy of it, by the present opportunity if convenient."

In answer to this letter, Mrs. Wells sent a copy of the residuary account as passed at the Stamp-office, together with a letter explaining the state of the accounts, and noticing that the amount of her payments exceeded that of her receipts, and that she had made arrangements by the sale of testator's London Dock Stock and otherwise, for re-paying herself.

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Mr. Hearn, in replying to this letter, stated that he saw nothing objectionable in the arrangements made by Mrs. Wells. Being, however, afterwards, advised that there were difficulties in the case, he filed the present bill against Mrs. Wells and Fleetwood Wells, alleging, as the fact was, that Fleetwood Wells had no issue, and that it was uncertain who would be entitled upon his death to the estates at Great Kimble &c., and praying, that an account might be taken of the residuary personal estate of the testator, that such personal estate might be converted, and that the trusts of the will might be carried into execution.

By the decree made on the hearing of the cause in May 1842, the usual administration accounts (a) were directed, and it was referred to the Master to inquire what was the state and condition and the circumstances of the testator's estate, not specifically bequeathed, at the time of his death, as to investment or otherwise, and also what had become thereof; and the Master was to ascertain and state what was the clear residue of the testator's personal estate, not specifically bequeathed, at the time of his death.

The Master by his report, after stating the respective amounts of the receipts and payments by the executrix, found that the amount of sums paid by the executrix in discharge of the testator's debts &c. exceeded the amount of sums received by her on account of the personal estate (other than the personal estate in Devonshire) by the sum of £3536. The Master then mentioned the state, condition, and circumstances of the personal property of the testator, not specifically bequeathed, at the time of his death. And he found that the only part of the personal estate which had not been got in by the defendant consisted of the following items: viz. a sum of £320 secured on a mortgage of leasehold lands at Weston Turville, certain shares in the Provident Assurance Society, County Fire Office,

(a) See Ord. Aug. 1841; No. 45.

and London Dock, of the value, in the whole, of £1790, and an annuity of £200, which had been purchased by the testator in 1813, consisting of the dividends on £6666 Consols, payable during the life of a Mr. Blackburn, who, at the time of the testator's death, was in his fiftieth year.

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With respect to the mortgage, the Master found that the testator took it by assignment in 1806, the original mortgage for a term of 500 years having been created in 1759; and that from the time of the assignment the testator, and after his death the defendant, Mrs. Wells, had been in possession of the mortgaged property; and that it had been admitted before him by the defendants, that, during the whole of that period, no claim had ever been made upon the testator or his wife in respect of the equity of redemption, nor had any interest been paid to them; and that £450 was admitted by Mrs. Wells to be the present value of the property if considered as discharged from the mortgage; but that she did not admit it to be so discharged.

With respect to the annuity, the Master found, that the value of it in 1818, the time of the testator's death, had been found, by an actuary employed by the plaintiff, to be £2252; and by an actuary employed by the defendant, to be £1678; but that the latter result had been obtained by adopting in 1818 the principle of valuation, from which the price in 1813 had been deduced; and that the former amount, or thereabouts, had been returned by Mrs. Wells as the value of the annuity in passing the residuary account at the Stamp-office.

The Master further found, that, under these circumstances, the plaintiff insisted that the mortgage must either be treated as a mortgage in possession, in which case the rents and profits for the whole period of possession by the testator and his representatives must be accounted for—or as an interest absolutely vested in the representatives of the testator, in which case the value of the premises ought to

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be ascertained, in order that the interest of the tenant for life and the reversioner might be adjusted, and for that purpose that an account of the rents and profits since the death of the testator ought to be taken: and with respect to the dividends of the stock, that the defendant Mrs. Wells ought to account for the testator's interest therein, according to the value of it at the time of his decease, and that she was, therefore, now chargeable with £2252 on that account.

On the other hand, the Master found, that the defendant Mrs. Wells insisted that, by reason of her payments having exceeded the total amount of the testator's estate which at that time was applicable thereto, she became a purchaser of the mortgage security, of the testator's interest in the dividends of the £6666 Consols, (the value of which she insisted must be taken at £1678 only), and of the shares so belonging to, and forming part of, the testator's personal estate not specifically bequeathed, and became entitled to retain the same for her own benefit; and that no part of the testator's personal estate was, at the date of the report, outstanding or undisposed of; and that there was no clear residue of the testator's personal estate not specifically bequeathed at the time of his death.

And with the consent of the parties to the suit, the Master submitted to the judgment of the Court, whether, under the circumstances before stated, the sum of £320, secured by mortgage and the testator's interest in the dividends of the £6666 Stock, and the shares and Dock Stock, were or were not properly to be considered as then forming part of the testator's personal estate outstanding. If the Court should be of opinion that they were so to be considered, then he submitted how and at what sum the mortgage sum and the testator's interest in the dividends were respectively to be valued and charged against the defendant Mrs. Wells. Under the circumstances before mentioned he stated that he was unable to

set forth whether there was any clear residue of the testator's personal estate, or what, if anything, was the amount of the same until the before-mentioned questions, with reference to the values of the mortgage and of the dividends on the said £6666 Stock, had been respectively determined by the Court.

The cause now came on for hearing for further directions and costs, and also for hearing upon the petition of the defendant Mrs. Wells, which had been presented under the following circumstances :—

In February, 1844, only a few days before the date of the Master's report, the petitioner was informed for the first time, that her late husband had executed, to his late sister Elizabeth Wells, a bond dated the 22nd of April, 1806, for securing to her an annuity of £95 per annum. It appeared that the testator had for some years made an annual payment of £95 to his sister; that he afterwards increased that payment to £100; that, previously to his death, he requested the petitioner to continue that payment; that she accordingly did so, and afterwards, of her own accord, increased it to £120 *per annum*, without knowing or suspecting that the testator had been under any legal obligation to his sister, but only supposing that in what she did she was fulfilling his wishes. It further appeared, that Mrs. Elizabeth Wells died in January, 1844; and that, in the following month, a claim was made by her executors upon the petitioner for the balance due in respect of the annuity, upon payment of which she was first made acquainted with the existence of the bond, by the circumstance of its being delivered up to her.

The petitioner, after stating these facts, which were verified by affidavit, prayed, that the sum of £2460, being the aggregate of the sums which the petitioner had paid in respect of the annuity, might be added to the sum of £3533 found due by the Master's report to the petitioner on the balance of the account of the personal estate of the testator come to her hands.

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It will be perceived that, taking the value of the dividends of the Consols to be £2252, and the value of the mortgage-money to be £450, as contended for by the plaintiff, and adding to those sums the admitted value of the shares, there would result a sum of £4492, which being larger in amount than £3526, the sum found due to Mrs. Wells by the Master, there would, upon deducting the latter sum from the former, remain a small amount of assets to be administered. But supposing Mrs. Wells's calculation of the value of the dividends to be right, or supposing the plaintiff's calculation to be right, and adding to the sum of £3536 the sum of £2460, mentioned in the petition, there would be no assets to be administered. In either of the latter cases, therefore, the question to be decided would be simply one of costs.

Mr. *Wigram* and Mr. *Calvert*, for the plaintiff, contended, that their client was justified in filing the bill, and was, therefore, entitled to his costs as between solicitor and client, whether there were any assets to be administered or not: *Larkins v. Paxton* (a), *Barker v. Wardle* (b), *Jackson v. Woolley* (c); but that here it must be considered that there were outstanding assets, out of which he was entitled to be paid. With respect to the sum of £2460, mentioned in the petition, Mrs. Wells's claim against the testator's estate could not arise until she had notice of the bond, which was not till about the date of the Master's report. It might be asked why the plaintiff did not stop the suit upon the coming in of the answer; but that was accounted for by the difference of opinion which existed between him and the defendant as to the value of the annuity.

Mr. *Baily*, for the defendant Fleetwood Wells.

Mr. *Follett* and Mr. *Selwyn*, for the defendant Mrs. Wells.

(a) 2 Myl. & K. 320. (b) 2 M. & K. 818. (c) 12 Sim. 12.

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—The testator died in 1818. The trust of the will is, that immediately after his death the plaintiff shall ascertain and realise the residuary personal estate of the testator. He, however, takes no step in the trust, but leaves the defendant in possession of the whole property, and after twenty years files his bill to ascertain the state of the assets. It is not disputed that the answer to that bill contained a true statement of the account, a circumstance which alone will deprive the plaintiff of the costs of prosecuting the suit after answer: *Anon. (a)*. The cases relating to simple contract creditors have no bearing upon the present case. In those cases certain assets are realised, and the creditors who come in and get the advantage of a fund for payment of their debts pay the costs of the suit; and it is just and reasonable that they should do so. But even in a creditors' suit, if there be no assets applicable to the payment of the debts, the plaintiffs will be ordered to pay the costs of the suit: *Bhuett v. Jessop (b)*. In the present case the defendant, to whom the fund belongs, receives no benefit from the suit. The only party who receives any benefit from it is the plaintiff, and he gets the protection of the Court. If he gets that protection, and there are no outstanding assets to be administered, can he claim costs against the executrix? It cannot be said that the assets of which the executrix is the rightful purchaser are outstanding assets. Upon *plenè administravit*, pleaded by an executor, if it be proved that he hath goods in his hands which were the testator's, he may give in evidence that he hath paid to that value of his own money, and need not plead it specially: *Co. Litt. 283. a.* [The Vice-Chancellor referred to the observations of Sir Thomas Plumer, in *Chalmer v. Bradley (c)*, but said that he did not think those

(a) 4 Madd. 273.

(b) Jac. 240.

(c) 1 J. & W. 64. If the pro-

perty in question had been personal, &c.

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observations were intended to be taken strictly ally.] This case has been treated in the *Mas* entirely as a question of amount of payment, the by the executor being admitted. It is too late for the plaintiff now to contend that there are any assets. The defendant was a purchaser of the at the death of the testator, and the only question is the sum due?

In the course of the argument the case *Curtis* (a) was mentioned as bearing upon the the value of the annuity.

The VICE-CHANCELLOR, (after referring to *Briddock* (b) and *Anon.* (c)).—This bill is filed by a residuary legatee in trust against the sole executor against one of the persons for whom the plaintiff is a residuary legatee in trust. The executrix and the defendant are the only persons living who are benefited by the trust; but if any, of Fleetwood Wells will be interested in the residue under the trust; but if any, of Fleetwood Wells will be interested in the residue, and will have a right to call the trust to account for the manner in which he has executed his duty.

Now, that there is a right in the plaintiff under such circumstances, no one has denied. But it is said that the amount of the residue by the executrix in respect of debts and the estate is so great as to leave no residue; and this is an answer to the plaintiff's demand in the suit. Supposing a suit of this nature to be instituted, the right to costs may depend, whether there are assets in Court, or whether the estate is to be administered. If there are such assets, I apprehend, generally is, that the

(a) You. 543.

(b) 2 Vern. 608.

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out of those assets, whatever may be the demand of the executor in respect of other payments or other creditors. I can conceive a case where a suit may have been instituted under such circumstances of desperation as to make an exception to the general rule. That is not so here. It was reasonable that the plaintiff should file his bill to ascertain how the matter stood, more especially with respect to the annuity and the mortgage. As to the latter, I think it was his positive duty as a trustee not to rest satisfied with the statements of the executrix. When I add, that it appeared for some time, that, if anything should accrue upon these two items, the property would yield a residue, (the existence of the bond not being then known), it seems to me that it was proper and just to take those steps in the cause that were taken. Therefore, if there are outstanding assets, according to principle and authority, the costs must be paid out of those assets, whatever may be the hardship on the executrix. As to the right of an executor to outstanding assets, the rules laid down in the books must be taken with some qualification. I cannot accede to the proposition that an executor has a right, in equity, to acquire, as a purchaser, an absolute title to specific chattels, by intending so to deal with them, and by paying the testator's debts to an amount exceeding the value of those chattels. Whatever may be the rule of law upon a plea of *plenè administravit*, I apprehend that not to be the rule in equity. I do not agree, that, in equity, the executor has, under such circumstances, an absolute right to the property.

I should, therefore, hold here, that there were outstanding assets, but for the form in which the accounts were stated in the Master's Office. Mr. *Follett's* able argument has raised a doubt in my mind as to this—namely, whether the case is not so constructed as to preclude the plaintiff from raising that question. Upon this point I will reserve my opinion until I have read the papers, as

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also my opinion upon the question of the plaintiff's costs being as between solicitor and client, as to which I entertain some doubt. Subject to this reservation:—the outstanding assets must be applied, first, in payment of the costs of the executrix, and then of the plaintiff; and the plaintiff must pay Fleetwood Wells's costs and add them to his own.

July 6th.

On a subsequent day, the *Vice-Chancellor* said, that he was of opinion, notwithstanding the form of the proceedings in the Master's Office that the assets in question must, for the purpose of costs, be considered as outstanding assets. His Honor, however, added that he should not award costs to the plaintiff, as between solicitor and client. The cases of creditors' suits did not, in his opinion, govern the present case; and the party who, in *Jackson v. Woolley*, received costs as between solicitor and client was in a situation materially different from that of the present plaintiff.

DECLARE, that the defendant M. A. Wells is entitled to add the amount of the debt in the petition mentioned to the amount found due to her by the report of the Master, dated the 16th February, 1844; and that, having regard to the circumstances appearing in the Master's report, and in the petition and affidavits filed in support thereof, the defendant M. A. Wells is entitled to retain for her own benefit all the assets of the testator Joseph Wells appearing in the said Master's report to be unconverted, subject to the payment of the costs of the plaintiff and the defendant Fleetwood Wells. And the said M. A. Wells, by her counsel consenting thereto, let the plaintiff pay to the defendant Fleetwood Wells his costs of the suit; and let the defendant M. A. Wells pay to the plaintiff what he shall so pay for the said costs, and also the plaintiff's costs of this suit. Refer it to the taxing Master to tax the costs of the plaintiff and the defendant Fleetwood Wells, in case the parties differ. Liberty to apply.

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July 23rd,
24th, 25th, &
26th.
August 3rd.

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IN the year 1826, William Sidney Warwick, a native and citizen of Virginia, but resident and carrying on the business of a merchant in London, married Elizabeth Louisa Holdsworth, an Englishwoman.

By a settlement, dated the 4th April, 1826, and made previously to the marriage, the sums of £1250 and 3028*l.* 6*s.* 6*d.*, making together 4278*l.* 6*s.* 6*d.* £3 per cent. Consolidated Bank Annuities, and the sum of 1740*l.* 10*s.* £3 per cent. Reduced Bank Annuities, being the fortune of the intended wife, were assigned to Benjamin Goodwin Davis and George F. Davis, their executors, administrators, and assigns, upon trust that they, or the survivor of them, or the executors, administrators, or assigns of such sur-

Upon the marriage of an Englishwoman with a citizen of the United States, who was temporarily resident in England, the fortune of the wife, consisting of stock in the British funds, was assigned to trustees, who were Englishmen, and relatives of the wife, upon certain trusts for the husband and wife, and the issue of the mar-

riage. By the settlement, power was given to the trustees, with the consent of the husband and wife, to invest the trust property in the names of the trustees or trustee for the time being, in the public funds of Great Britain or America, or upon real securities in England, Wales, or America; and power was also given to the husband and wife or the survivor, in case the existing trustees should be desirous of being discharged from the trusts, to appoint new trustees. After the marriage, the husband and wife lived for about five years in England, and then went to reside permanently in America, having, previously to their departure, appointed three Americans to act as trustees in the room of the two original trustees, the trust property being at the same time transferred by the English trustees into the American funds in the names of the three American trustees:—*Held*, that this appointment of American trustees, though not expressly authorized by the settlement, was valid.

Upon the construction of the power for appointing new trustees and the clause for the indemnity of the trustees contained in a marriage settlement,—*Held*, that the appointment of three new trustees in the room of the two original trustees of the settlement was valid.

By a marriage settlement, trusts of certain property in the English funds were declared in favour of the husband and wife and issue of the marriage. The trustees afterwards retired from the trust, having transferred the whole of the trust fund into the American funds, in the names of new trustees, who were Americans. Subsequently, upon an apprehension by the old trustees that this transfer amounted to a breach of trust, the husband deposited with them certain tobacco warrants, which, by a written agreement between the parties, the old trustees were to be at liberty to sell, for the purpose of recovering the trust fund, they, by the same instrument, in consideration of this security, agreeing to suspend proceedings in America for the recovery of the trust fund. In pursuance of this agreement the old trustees sold the tobacco warrants, and invested the produce in Exchequer bills; but it was afterwards decided by a court of equity in England, that, at the time of the execution of the agreement, no breach of trust had been committed; and that the old trustees had then no interest in the fund:—*Held*, that, as there was no consideration for the deposit or agreement, the old trustees had no right, as against the husband or his representatives, to retain the Exchequer bills for the benefit of the infant children of the marriage.

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vivor, should get in and receive the said estates, monies, stocks, funds, securities, shares, and property thereby assured, as and when the same should respectively become due and payable; and should (but with the consent in writing of the intended husband and wife and the survivor of them) lay out and invest the same, immediately after the receipt thereof, at interest, in the names or name of the trustees or trustee for the time being, either in or upon any of the public stocks or funds of Great Britain or America, or upon real securities in England, Wales, or America, and should from time to time (with such consent as aforesaid) alter, vary, and change the securities in or upon which the same trust monies, or any part thereof, should from time to time be invested, either as occasion should require or as should be thought proper and expedient, and should stand and be possessed of the said trust monies, stocks, funds, and securities, and the dividends, interest, and income thereof upon the trusts following, &c. The trusts were—to pay the annual interest and dividends to the intended wife for her life, without power of anticipation; after her decease to the intended husband for his life, or until he should become bankrupt; and, after the decease of the survivor, to apply the trust funds for the benefit of the children of the marriage as tenants in common.

The settlement then, after regulating the fortunes of the children, contained a proviso, that it should be lawful for the trustees, with the consent in writing of the intended husband and wife, or the survivor, to invest the trust fund in the purchase of any fee-simple lands or tenements in England, Wales, or America, either of freehold or copyhold tenure.

The settlement then provided that, in case the said Benjamin Goodwin Davis and George Frederick Davis, or any of them, or any new trustee or trustees to be appointed under that present provision in their or either of their place, should depart this life, or be desirous of being dis-

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charged of and from the aforesaid trusts, or should neglect or refuse or become incapable to act in the said trusts before the same should be fully executed and performed, then, and so often as the same should happen, it should be lawful for the said William Sidney Warwick and Eliza Louisa Holdsworth, his intended wife, during their joint lives and after the decease of them, then to and for the said William Sidney Warwick alone, if living, or his executors or administrators, or in case of his or their default as therein mentioned, or in case there should be no executor or administrator of said William Sidney Warwick, then for the acting trustee or trustees for the time being, or the last acting trustee, or the executors or administrators of the last acting trustee, to nominate any person or persons to supply the place of the trustee or trustees respectively so dying, desiring to be discharged, or refusing, neglecting, or becoming incapable to act as aforesaid; and that, immediately after such appointment, the trust estate, money, stocks, funds, and securities, which should be then vested, under or by virtue of those presents, in the trustee or trustees respectively so dying, &c., should be conveyed, assigned, and transferred *so and in such manner as that the same might vest in such new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case might require*, and in his, her, or their executors, administrators, or assigns, upon the trusts thereinbefore expressed and declared of and concerning the same; and that every new trustee should have, and might exercise, the same powers and privileges whatsoever, as if he had been appointed a trustee by those presents, and as if his name had been inserted in those presents, instead of the name of the trustee or trustees in or to whose place such new trustee or trustees respectively should come or succeed.

The settlement then contained a proviso, that any one or more of the trustees thereby appointed, or to be appointed, should not be answerable or accountable for the

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other or others of them, or any or either of them, for the acts, receipts, or defaults of the other or others of them, nor for any involuntary loss whatsoever; and that it should be lawful for them respectively, by and out of the monies which should come to his and their respective hands by virtue of the trusts aforesaid, to deduct, retain, and reimburse to and for himself and themselves respectively, and also to allow to his and their co-trustee *and co-trustees*, all costs, charges, damages, and expenses which he or they or any of them should or might suffer, sustain, expend, or be put to in or about the execution of the aforesaid trusts, or in relation thereto.

Shortly after the execution of the settlement, the trust funds were duly transferred into the names of Benjamin Goodwin Davis and George Frederick Davis, who paid the dividends from time to time, as they became due, to Mrs. Warwick.

In October, 1831, the husband and wife addressed a letter to the trustees, requesting them to transfer the property from the British into the American funds; and expressing a wish, that, as it would be better, for various reasons, to have trustees resident in America, they would withdraw from the trust, and appoint Mr. Abraham Warwick, Mr. Corbin Warwick, and Mr. John M. Warwick, in place of themselves.

To this request the trustees, as they stated by their answer, did not object; and accordingly, by an indenture executed by the husband and wife, of the first part; the original trustees, of the second part; and the proposed three new trustees, of the third part; reciting, that the original trustees were desirous of being discharged from the trust the parties of the third part were appointed trustees in the room. This deed was executed on the 13th October, by the parties thereto of the first and second parts, and by Abraham Warwick, who, alone of the three new trustees, was resident in England, and that for a temporary pur

only; Corbin Warwick and John Marshall Warwick, being resident in the United States of North America, of which country they, as well as Abraham Warwick, were citizens.

Immediately after the execution of this deed by the above-mentioned parties, the husband and wife addressed and sent a letter to the original trustees, requesting them to transfer the sum of 4278*l.* 6*s.* 6*d.* £3 per cent. Consols, and 1740*l.* 10*s.* £3 per cent. Reduced Annuities, into the name of Mr. Abraham Warwick for the purpose of being invested by him in the United States Stock, immediately on his arrival in America, in the names of the three new trustees. Accordingly, on the same 18th October, the original trustees transferred these two sums of stock into the sole name of Abraham Warwick, and delivered to him the marriage settlement and deed of appointment. Abraham Warwick sold out the stock, and in the following month invested the proceeds of the sale in the purchase of 25,261 dollars in the United States £3 per cent. Stocks, in the names of himself and the two other new trustees. This stock was, in 1832 and 1833, with the interest that had accrued, paid off by the government of the United States, and the amount was, at the joint written request of Mr. and Mrs. Warwick, invested by the American trustees on a mortgage of estates in the state of Virginia.

In 1836, the original trustees Messrs. Davis, having been advised, that, in making this transfer, they had committed a breach of trust, requested William Sidney Warwick to cause the trust funds to be re-transferred into the British funds in their joint names, and called upon him to give them security for such re-transfer; whereupon dock warrants for 850 hogsheads of tobacco were delivered by him and his partner Thomas William Claggett into their hands, accompanied with the following memorandum, signed by the parties:—"London, 19th November, 1836. We, the undersigned Messrs. Warwick & Claggett, have this day delivered into the hands of the undersigned Messrs. George

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Frederick and Benjamin Goodwin Davis, dock warrants for 350 hogsheads of tobacco, described as underneath, as security to Messrs. Davis for a sum not exceeding £6000, being the fund liable to a settlement made upon Mr. Warwick's marriage, of which settlement the said Messrs. Davis were trustees, and which funds, or security for the same, it is understood, are in the hands of brothers of said Mr. Warwick, in Virginia. This tobacco, said Messrs. Davis will hold as security until the expiration of twelve calendar months from the date hereof, when they are to be at liberty to sell for the purpose of recovering the trust funds ; and, in consideration of this security, the said Messrs. Davis agree to suspend proceedings for the recovery of said trust fund from the said Messrs. Warwick, in Virginia ; and, upon payment of this fund, they are to deliver over said tobacco to said Messrs. Warwick & Claggett, or their order ; and, if required, are to send Mr. Warwick's brother a certificate that the same has been invested in the Bank of England. It is understood that the above security can be exchanged for any other that may be satisfactory to the aforesaid Messrs. Davis."

On the 12th May, 1837, a fiat in bankruptcy issued against William Sidney Warwick and his partner Claggett under which they were declared bankrupts.

The trust funds were never restored to Messrs. Davis. They, accordingly, on the 15th December, 1837, sold the tobacco mentioned in the warrants ; receiving from such sale, after payment of expenses, the sum of 5659*l.* 7*s.* 5*d.*, which they laid out in the purchase of Exchequer bills.

The bill was filed by the assignees under the bankruptcy against the English and the American trustees, the husband and wife, and their three infant children ; and it prayed, that the dock warrants and tobacco might be delivered up to them, and that the agreement of November, 1836, might be delivered up to be cancelled ; and if the Court should be of opinion, that the plaintiffs were not entitled to have

that relief until it was ascertained whether the trust funds had been duly invested in real securities in America, or in some other security, according to the provisions of the settlement, then that it might be referred to the Master to ascertain whether the funds had been so duly invested; and if it should appear that the funds had been so duly invested, then that the Exchequer bills might be delivered up to the plaintiffs; but if it should appear otherwise, then that the American trustees might be decreed to reinvest the funds in securities in this country upon the trusts of the settlement, and thereupon that the Exchequer bills might be delivered to the plaintiffs.

At the time of the filing of the bill, Mr. and Mrs. Warwick and their family were residing in England, where their three children had been born; but, after putting in their answer, which they did in September, 1837, they left this country for America, where they stated it to be their intention permanently to reside.

The cause now came on for hearing, and the principal questions were, first, whether the acts of the English trustees amounted to a breach of trust, so as to render it necessary for them to retain the Exchequer bills for their own indemnity; and, secondly, whether, if that was not necessary, they had not nevertheless a right to retain them as a security for the infants, on the ground of express contract arising under the document of the 19th November, 1837.

Mr. *Wigram* and Mr. *R. Palmer*, for the plaintiff, after observing, upon the first point, that the appointment of the three new trustees in the room of the original trustees was valid within the terms of the settlement, and after distinguishing this case in that respect from *Ex parte Davis* (a), were stopped by the Court.

(a) 2 Y. & C. C. C. 468.

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(a) 2 Y. & C. C. C. 468.

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Mr. *Swanston* and Mr. *Lee*, for the defendants *Davis*.—The defendants have a right to retain the fund which they now hold, for their own indemnity, against any case that may be made against them for a breach of trust; and such case, if it is submitted, may be made against them. First, the appointment of three trustees was improper, two only having been contemplated by the settlement. The words of the settlement, *reddendo singula singulis*, refer to the case of the appointment of two new trustees jointly, or one new trustee jointly with a continuing trustee. [The *Vice-Chancellor* referred to the clause for the reimbursement of the trustees.] The intention as to the number of trustees must be gathered from the whole settlement, and not from particular clauses. Next, although the settlement authorizes an investment of the funds in American stock and in American real property, it does not authorize the appointment of American trustees. The fund was the wife's; the original trustees were her relations, interested in protecting her infant children, and accountable to this Court. How can the objects of the settlement, more especially the protection of the interests of the children, be effected, by permitting foreigners, over whom the Court will have no control, to act as trustees under it?—The effect of the present investment and appointment of trustees will be to deprive the infants of the fund provided for them by the care and providence of their mother's family. Before the Court sanctions this, and leaves the infants the chance of the produce of a mortgage in America, it will require to be satisfied of the value of the mortgage security. [The *Vice-Chancellor*.—If the appointment of the three trustees was justified, and the funds are traced into American stock in their names, does not the inquiry cease?] The question is, whether the three trustees were well appointed, both as respects their numbers and the country to which they belong. [The *Vice-Chancellor*.—Supposing that Messrs. *Davis* had

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retired from the trust, and two Englishmen of undoubted credit had been appointed in their stead, and these two Englishmen had invested the property in American funds, that would have been well. Suppose that those two Englishmen had afterwards died insolvent, in which case there would have been neither funds nor persons that this Court could pursue, could it have been argued that there was a breach of trust?] The difference is, that there the matter would have been regularly done, whereas, here it is irregularly done. If the parties pursue the law, however unfortunate the transaction may be, there is no wrong; but, if they leave the track pointed out to them by the law, and misfortune happens, their going out of that track may be said to have occasioned the misfortune; and therefore they are liable. In the present case, the parties have gone wrong, for they have appointed three trustees, where they ought to have appointed only two—foreigners, where they ought to have appointed Englishmen; and then, to render their error more complete, they sell the funds out of the British stock, and hand the produce over to Abraham Warwick alone; he alone of the three new trustees having ever been in England. The last act would have clearly been a breach of trust, even if Abraham Warwick had been a native of this country. In the case of *The Attorney-General v. The City of London* (a), which appears to have an important bearing upon the present question, Lord Rosslyn was moved by the consideration, that, if the Court took upon itself to look to the execution of a trust, it would have the persons bound to discharge the trust amenable to its jurisdiction; and, therefore, he undid that which no man could say had been originally improperly done. [The Vice-Chancellor.—In that case, as I understand it, the colony had ceased to be a colony, and the question was, therefore, whether a portion of the income of the cha-

(a) 1 Ves. jun. 243.

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rity should be applied for the extension of the Christian religion in a foreign country, rather than in one of our colonies. It seems not to have been intended that the income should be distributed in a foreign country.] Lastly, the instrument of the 19th November, 1836, is a binding contract to restore the funds to the jurisdiction of this country, contract of which the infants have a right to avail themselves through the Messrs. Davis, and by virtue of which they have power to adopt the acts of parties who represent themselves as trustees for them, and who could not for that purpose be heard to say, that they were not trustees. If the infants do not insist on their rights, it is because their defence is conducted by the solicitor for the plaintiffs. But in *Shaw v. Roundtree (a)*, under similar circumstances Sir *William Grant* stopped the cause, until the infants should be differently represented.

The VICE-CHANCELLOR.—The first question is, whether immediately before the agreement of the 19th November 1836, was made, Messrs. Davis were under any liability: having been trustees of the marriage settlement of Mr and Mrs. Warwick, by reason of the acts which had been done, in which they participated or which they allowed. That question depends, first, upon the point, whether it was proper, when the two original trustees retired, to appoint three trustees instead of them. Generally, it is true, that there ought to be an adherence to the original number of trustees, where new trustees are substituted. This is conformable to the presumed intention of the parties, where nothing to the contrary appears: though, in the abstract, it may be difficult to suggest much inconvenience from appointing three trustees to act in the place of two who are dead. If, however, the instrument is so worded as to authorize an appointment of three trustees to suc-

(a) Not reported.

ceed two, of course, such an intention appearing must have effect given to it; and I have already expressed my opinion, that this instrument contains expressions which cannot properly be interpreted consistently with the notion, that the parties did not contemplate or foresee that there might be an appointment of three or more trustees to succeed the two. Having already alluded to those particular passages, I need not repeat them. I have considered the matter since the case was before me yesterday, and I remain of opinion, that, assuming the general rule to be as I have stated, this instrument exhibits upon the face of it, taking the whole of it together, an intention to give a permission that there should or might be appointed three trustees. I think, therefore, no liability on the part of Messrs. Davis arises on that ground, having regard to the particular form and language of this settlement.

The next objection is one of a more formidable nature, namely, that the three trustees substituted were American citizens, of whom one only was or is resident in this country. His residence in this country must be taken to have been only for a temporary purpose; and, without deciding the general question, I will assume, that, in general, where there is a settlement made in England upon the marriage of English persons, though extending only to personal property, and the original trustees are English, it would be an imprudent and improper exercise of the power of appointing new trustees to appoint foreigners, or even to appoint English persons habitually resident out of England. But how does the present case stand? It is that of a settlement of mere personalty—of portions of the British funds belonging to an Englishwoman who marries a Virginian, a citizen of the United States, resident (I must take it for a mere temporary purpose) in England, and without any change of domicil proved or alleged to have taken place. The domicil of origin, as we know, re-

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mains until it is shewn to have been lost. The mere fact of being in a foreign country, or staying in a foreign country, does not, without more, change the domicil of origin. I must, therefore, consider, that, in the present case, the domicil of origin of this gentleman was Virginian, and has continued so throughout his life hitherto. This being so, the instant that he married, and by the very fact of his marriage, the domicil of his wife became Virginian by necessity; and the settlement being thus made, in the English form I agree, but under circumstances rendering it probable and reasonable that the husband and wife would go to the United States, and that the children would become settled in the United States, we find, in that clause of it which authorizes the change on securities, a provision enabling the property to be invested in the government funds of America, (the word, if used in its largest sense, being applicable not to the United States only), or in real securities in America, or in the purchase of lands in America.

It is quite plain, therefore, according to the intention of the parties, as expressed in this settlement, that the whole of the settled property might be withdrawn from the jurisdiction and power of the Court, leaving only the persons of the trustees answerable; and if those persons, so remaining answerable to the Court, were to shew that they had obeyed the settlement by placing the funds within a foreign jurisdiction, according to the language of the settlement, they would be exempt from censure. The Court would in such a case have done with them, inasmuch as the object of the settlement would have been fulfilled. Now, such a case must have been contemplated as probable, and might most reasonably and properly have occurred. What then appears? The husband and wife propose to return to the country of the husband—to do that which was reasonable, and must probably always have been expected. I see nothing in the case to induce me to

form any other conclusion, than that return was always contemplated. The return of a man to his own country from a foreign land, in which he is not domiciled, ever has been, and ever must be, contemplated in point of law. The husband and wife then desire to have the funds, according to the terms of the settlement, invested in American securities, in the names of American trustees. The two trustees resident in this country, who are the brothers-in-law of the wife, or connected with the wife's family, are either desirous to be relieved from the trust generally, or are desirous of forwarding the objects of the husband and wife. They, accordingly, retire from the trust, and in their place are appointed three Virginian citizens, relatives of the husband—English in language, as I suppose the husband was—English in family origin, as the husband must be taken to have been, and, in all respects, standing on the same footing as the husband himself did. Now, I am asked, upon a settlement containing such clauses, and executed under such circumstances, to say that this was, of necessity, an improper appointment of trustees. I am of opinion, whatever may be the general rule, that, in this case, the course pursued was proper and justifiable; but when I make the observation, it is impossible to say that doubts and difficulties on the subject might not reasonably have suggested themselves to any counsel or adviser. I am, therefore, not at all surprised that the learned gentleman, so eminently capable of giving good advice, to whom Messrs. Davis referred on this occasion, should have thought it matter to be reasonably guarded against, and should have recommended them to take the security which they have done.

The next question is as to the safety of the funds. It appears that originally an irregularity was committed by Messrs. Davis, not ill intended, in placing the funds for a time without any indemnity in the sole custody of one of

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the new trustees. But from the hands of that single trustee the funds found their way, as I understand it to be proved, into the names of the three new trustees in the government securities of America; and, that being done Messrs. Davis, as I think, were altogether delivered from all liability and risk whatever under this settlement. At a subsequent period, however, when years had passed away, a difficulty was suggested upon the question whether the power of appointing new trustees had been properly exercised,—a difficulty which, I repeat, I do not at all wonder should have presented itself to the minds of the advisers of Messrs. Davis. That circumstance produced the paper which, in the opening of this case, was treated as a paper of mere indemnity. If it is a paper of mere indemnity there was, in my opinion, nothing to indemnify against. The difficulty, in my mind, is, whether, consistently with all that I have stated, this paper is a paper of mere indemnity—whether it is or is not a binding contract, of which the infants have a right to avail themselves, through Messrs. Davis, for the purpose of restoring the funds to the jurisdiction of the English courts. Upon that part of the case, and upon that part only, I wish to hear the counsel for the other parties.

July 25th.

The cause was argued on a subsequent day upon the point last referred to by the *Vice-Chancellor*; and, for the more especial purpose of this argument, evidence was read on the part of the plaintiffs to shew that the mortgage in Virginia was a satisfactory security.

Mr. *Wigram* and Mr. *R. Palmer*, for the plaintiffs, then contended, that their clients had a right to recover the Exchequer bills either on the ground that the agreement of the 19th November, 1836, had been entered into under a plain and common mistake between the parties: *Farewell*

v. Coker (a), Pullen v. Ready (b), Pusey v. Desbouvrie (c), Lansdown v. Lansdown (d), Melland v. Gray (e), or that there was no consideration for that agreement, there being no right of suit which could be the subject of forbearance as stated in it: Jones v. Ashburnham (f), Longridge v. Dorville (g).

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Mr. *Lee*, *contra*, contended, that the evidence as to the present security of the trust funds was not satisfactory.

The VICE-CHANCELLOR (after referring to *Harvey v. Cooke (h)*).—I need not repeat the reasons already stated by me for the opinion which I have before expressed, and still entertain, that the three new trustees were properly and well appointed in the place of the two original trustees, Messrs. Davis. It has not been denied, and is, I think, sufficiently proved, that the whole of the clear produce of the sale made of the original trust funds, at the current market-price, after the appointment, was invested in the government funds of the United States of America in the names of the three new trustees. As all this took place with the consent, in writing, of the husband and wife, as, whether the mode adopted for transmitting the produce of the sale of the English stock to America was or was not perfectly correct, it did, in fact, arrive there, and was invested in the manner just mentioned, and as this investment took place before the year 1836, I conceive, that, whatever was the situation or condition of the trust property in 1836,—whether the three new trustees, after the original American investment had taken place in their names, did or did not commit any breach of trust,—neither of the two original trustees was, when they obtained the

(a) 2 Mer. 353; cited.

(b) 2 Atk. 591.

(c) 3 P. W. 315.

(d) Mos. 364.

(e) 2 Y. & C. C. C. 199.

(f) 4 East, 455.

(g) 5 B. & Ald. 117.

(h) 4 Russ. 34.

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deposit and agreement of November, 1836, under any liability whatever in respect of the marriage settlement or its trusts, or the appointment of new trustees, or the mode in which the trust funds had been dealt with. Neither of them, therefore, I conceive, had, when they obtained the deposit and agreement, any right of suit whatever against the new trustees and the husband and wife, or either of them. Of course, there was no such right as against the house of Warwick & Claggett.

Taking these things to be so, ought the Court to give validity and effect to the deposit and agreement by appropriating the Exchequer Bills, which represent the property deposited, to the purposes of the marriage settlement, or by withholding these bills from the plaintiffs, (who have the rights of the husband and of the house of Warwick & Claggett), until the trust property shall be replaced in the English funds? or ought the Court to allow the plaintiffs to receive and apply the Exchequer bills as part of the estate of Mr. Warwick, the husband, or of his house of Warwick & Claggett? This is the one remaining question. I have considered it, and, in doing so, have felt myself bound to bear in mind, that, were the trust property replaced in the English funds, the right to make an American investment under the marriage settlement would still remain; and that Mrs. Warwick approves of the present investment in America, disapproves of the claim now made by the survivor of the two original trustees, and by the representatives of the late Mr. Davis, and supports the case of the plaintiffs; as do her husband, and one at least of the new trustees.

If it were now clear that the present investment, the Virginian mortgage, is one authorized by the terms of the settlement, and in conformity with its trusts, as those terms and trusts are understood in this Court, I should feel no difficulty. But that point is not, upon the evidence, clear to my mind; though, I may observe in passing, that I

am not satisfied of the contrary, and that I think the substantial safety of the security highly probable. Whether, however, this mortgage is or is not an authorized security, is or is not an insufficient security, I am, upon consideration, of opinion that the plaintiffs, as the assignees of Mr. Warwick, the husband, and of the house of Warwick & Claggett, are entitled to have the Exchequer bills delivered to them. It is, I think, upon reflection, a necessary consequence of holding, as I do, that, before the year 1836 Messrs. Davis, and each of them, had ceased to be under any liability in respect of the trusteeship, had ceased to have any connexion or concern with it, had no right to make the demand which produced the deposit and agreement of November, 1836. I do not think that the position of the parties to that transaction, in respect of the matters in question, was correctly understood by either of them. I do not think that the manner, in which the rights and interests of Mrs. Warwick and her children and the new trustees might interfere with the transaction or bear upon it, was duly or accurately considered; nor do I think it inconsistent with authority or principle to say, that there was not a valuable consideration for the deposit or the agreement. I have, since the argument, referred to the case of *Longridge v. Dorville* mentioned at the bar, to the cases of *Haigh v. Brooks* (a) and *Brooks v. Haigh* (b), and to other authorities old and new; nor do I forget that the English stock was transferred into the name of Mr. Abraham Warwick alone, and sold by him alone; or that its produce was remitted to America in the manner which appears; or that the transaction of 1836 did not rest in mere contract; that the deposit was actually made; that the goods represented by the Exchequer bills were actually in the possession of Messrs. Davis; that they (the survivor, I mean, and the personal representatives of the other of them) are defendants here, not plaintiffs; that this is a suit in equity,

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(a) 10 Ad. & Ell. 309.

(b) Id. 323.

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not an action ; that they have been heard in support of what they consider the infants' rights and interests, as well as their own; and that the view of the infants' interests and their rights, if any, in this cause, which has been taken by the guardian *ad litem* and counsel of the infants, does not bind the Court or take away its power of judging for itself on their behalf, so far as the rights of other parties will permit. Bearing all this in mind, I am still of opinion that justice and equity under the circumstances of this case require, as I have said, that the Exchequer bills should be given up to the plaintiffs ; and I so decree.

The parties have, I understand, made arrangements, between themselves as to the costs, which I have no inclination to disturb.

July 11th &
 12th.

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Testator bequeathed all his personal estate to his wife, with the exception of two leasehold houses, the rents of which he gave to her during her life, and after her death directed that they should be sold, and the produce divided between his four children ; and he appointed his wife and another person his executrix and executor. Upon the death of the

CHARLES SALMON, by his will, dated the 1st March, 1834, gave and bequeathed unto his wife Elizabeth Salmon, all his personal estate and effects whatsoever and wheresoever, to and for her own use and benefit, excepting his leasehold house in Dorset-street, and his leasehold house in East-street, both in the parish of Saint Marylebone, in the county of Middlesex, the rent or rents arising from which two houses he gave unto his said wife Elizabeth Salmon, during the term of her natural life ; and after the death of his said wife, his will was, that the two above-named leasehold houses should be sold for the best price that could be got, and the produce of them should be equally divided between his daughter Mary Ann Maynard, (since deceased), the wife of Robert Maynard, his

testator, the wife entered into possession of his personal property, including the leasehold houses, and paid all the testator's debts :—*Held*, under the circumstances of the case, that she had assented to the legacy to the testator's children.

It is not essential to the efficacy or validity of an assent to a bequest that it should confer a legal interest, or affect the mere legal title to the subject of the bequest.

daughter Elizabeth Emma Salmon, (afterwards the wife of Edwin Trail), his son Charles Salmon, and his son William James Salmon, share and share alike ; but that, if either of his daughters or either of his sons should die without issue, that share or shares should go and belong to those that had issue, share and share alike ; and he directed that the share or shares of his said two daughters should not be subject to any debt or debts, nor liable to the control, order, debt, engagement, or encumbrance of any husband or husbands that either of his said daughters had married or might marry, but should belong unto his said daughters only. And the testator appointed his wife Elizabeth Salmon executrix, and his friend, Thomas Bull, executor of his will.

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The testator died in October, 1834, leaving the several persons named in his will surviving him. Shortly after his decease, his widow proved the will, and took possession of his personal estate, including the rents of the leasehold houses in Dorset-street and East-street, and paid all the testator's debts, with the exception of some few of trifling amount, which were afterwards paid by Thomas Bull, who subsequently took out probate.

At the time of the testator's death he was in partnership with Thomas Bull as an omnibus proprietor. After his decease, the business was continued by the widow in co-partnership with Thomas Bull, until the year 1836, when a mutual settlement of accounts took place. In the course of that settlement, certain leasehold messuages, belonging to the copartnership, were allotted and assigned to each party respectively ; the assignments being dated the 12th of April, 1836. In one of the assignments from Mrs. Salmon to Bull, she covenanted that she had done no act to encumber, and for further assurance. In an assignment from Bull to Mrs. Salmon, there was a covenant by Mrs. Salmon, for herself, her executors, administrators, and assigns, to pay the rent and observe all the covenants in the

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original lease contained, on the part of the testator and Thomas Bull as copartners and joint-tenants, their heirs, executors, administrators, and assigns, to be paid and performed, and to indemnify Thomas Bull, his executors, administrators, and assigns therefrom.

Mrs. Salmon died in November, 1836. Shortly after her death, Thomas Bull took out probate to the will of the testator, and in December, he caused the leasehold premises in Dorset-street and East-street to be sold by public auction; whereupon Robert Maynard, in right of his late wife Mary Ann Maynard, Edwin Trail and Elizabeth Emma his wife, Charles Salmon the son, and William James Salmon, joined in the assignment to the respective purchasers. The purchase-money was invested in Consols, and some time afterwards, Robert Maynard, Charles Salmon the son, and W. J. Salmon, each received from Thomas Bull his one-fourth part of the fund, pursuant to the trusts of the testator's will.

Thomas Bull died in March, 1840, having by his will appointed his widow Catharine Bull to be his executrix.

The bill was filed by Elizabeth Emma Trail, against Catharine Bull, Benjamin Bovill, who was the administrator with the will annexed of Mrs. Salmon, and Edwin Trail, for the purpose of obtaining payment of the plaintiff's share of the purchase-money for the leasehold messuages in Dorset-street and East-street.

The defence on the part of Mrs. Bull was, that, since the other shares had been paid, circumstances had occurred which rendered it necessary to retain the share in question, by way of indemnity to Salmon's estate against possible breaches of the covenants by Mrs. Salmon, contained in the assignments of April, 1826; and she insisted that no assent had been given, either by Mrs. Salmon or Thomas Bull, to the bequest of the messuages in Dorset-street and East-street.

The cause came on for hearing before *Knight Bruce*,

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V. C., in March, 1842, when it was referred to the Master to inquire whether the bequest was ever, and when, assented to by Thomas Bull and Elizabeth Salmon, or either, and which of them; and if the Master should find that there was any such assent, and he should make a separate report thereon, it was ordered, that either party should be at liberty to apply to the Court, either on such separate report or exceptions thereto, without proceeding on the other matters.

The Master made his separate report, stating the several circumstances before mentioned, and also stating, that, upon the final adjustment of the partnership accounts between Mrs. Salmon and Thomas Bull, she gave him her promissory note for the balance of £40 due to him; and that the parties then also gave each other a receipt in full of all demands. And the Master further found, that Mrs. Salmon, upon several occasions, in referring to the business which she so carried on after her husband's decease, stated that she would get rid of such business and live upon the rents of the two leasehold houses in Dorset-street and East-street; that, in the month of March, 1835, she gave instructions for her will to a Mr. Groom, and upon that occasion informed him that the property she had to bequeath was what she had taken under the testator's will; that she accordingly made her last will and testament in writing, dated the 29th of March, 1835, and thereby gave certain specific parts of her personal property as therein mentioned, and that she then also represented to the effect that the property she was possessed of had accrued to her under the said testator's will.

The Master then, after stating the sale of the property by Bull as before mentioned, and that Bull permitted Bovill, the administrator of Mrs. Salmon, to take possession of her personal estate, found, that the bequest of the leasehold messuages in Dorset-street and East-street was assented to by Thomas Bull and Elizabeth Salmon, as executor and

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executrix of the said will; but he was unable to find any precise time at which the said bequest or disposition was assented to, except that he was of opinion, and found, that it was assented to by Thomas Bull in the month of December, 1836, and by Elizabeth Salmon before she made her will; and that it was expressly assented to by her at that time, that is to say, on the 29th March, 1835.

The cause now came on for hearing upon exception taken by Mrs. Bull to the separate report of the Master.

In addition to the evidence of assent stated by the Master it appeared from the depositions taken in the cause, which were read on the present occasion for the plaintiff, that Mrs. Salmon had, in various conversations with a Mr. Greaves and others, said, that, at her death, the houses in Dorset-street and East-street would go to the children.

With a view also of proving that Thomas Bull had sold the houses in the character of trustee, and not as executor of the testator, and had thereby given his assent to the legacy, the counsel for the plaintiff read evidence to the effect that Bull had permitted the general residuary estate which Mrs. Salmon had derived from the testator, and which she had bequeathed by her will, to be dealt with by Bovill her administrator; and that he, Bull, had also joined Bovill in a deed dated in March, 1839, by which part of that residue, consisting of leasehold property, had been conveyed to a purchaser.

Mr. *Russell* and Mr. *Evans*, for the exceptions.—The case of *Attorney-General v. Potter* (a) governs the present case. In that case, however, there was not, as there is here, a direction for sale by the executors. Now, although there are cases where, there being a legacy to an executor for life with remainder over, the assent of the tenant for life has been held to enure to those in remainder, yet, that will

(a) 5 Beav. 164.

not apply here, because, on the death of the tenant for life, the property again belonged to, and was in the disposition of, the other executors: *Doe d. Hayes v. Sturges* (a). It is difficult to find anything upon the evidence amounting to assent by Mrs. Salmon. But supposing such assent to be proved, what is the effect of it? It is an assent not operating upon a legal right. Granting that there is a special bequest to Mrs. Salmon during her life, yet, after her death, the only mode in which the testator deals with the property is by directing it to be sold. Can Mrs. Salmon's assent affect that mere direction? It is necessary that an executor's assent should carry with it more than a mere admission of assets; it must confer a legal title. This is not the case of a bequest to the widow for life with remainder to A. B., or to trustees in trust for A. B. There is no bequest here of the ultimate estate. Until the executor has sold the property and parted with the money to the legatees, he has not assented. Until then he may require indemnity: *Smith v. Day* (b), *Richards v. Browne* (c), *Doe d. Lord Saye and Sele v. Guy* (d).

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Mr. Cooper and Mr. Tripp, for the report.—It is clear from the manner in which Mr. Bull permitted Bovill to deal with the residuary personal estate bequeathed by Mrs. Salmon, that he considered that property as hers. Bovill could only sell as the representative of the legatee of the testator, and not as the representative of the testator himself. Bull, therefore, having so treated the residue under Mrs. Salmon's will, and having executed the deed of 1839, cannot be heard to say that he has not assented to the bequest to the plaintiff. It is clear that he sold the houses in question in this cause as trustee, and not as executor.

(a) 7 Taunt. 217; 2 Marsh. 505. (c) 3 Hodges, 27; 4 Scott, 262; 3 New Ca. 493.

(b) Murph. & Hurl. 185; 2 M. & W. 684. (d) 3 East, 120.

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If he did not, why should he embarrass himself with the *cestui que trusts*, who were joined as parties in the conveyance to the purchaser?

But it is more material to shew that Mrs. Salmon assented to this request. If the evidence of her assent is sufficient, the law is clear, that her assent will enure to the benefit of those who are entitled to the residue of the term after her decease: *Adams v. Peirce* (a), *Paramour v. Yardley* (b), *Doe d. Sturges v. Tatchell* (c), *Perkins*, 249 (d). And the evidence is sufficient. In *Garrett v. Lister* (e) A., possessed of a term, devised it to his wife for life, remainder to trustees for his son's life, remainder in trust for the heirs of the son's body, remainder to the son's right heirs, and makes his wife executrix; it was held, that the wife took the term wholly as executrix in the first place; but it being proved that she said, she would take the term according to the will, it was held by the Court to be a sufficient assent; and a case was cited where, in like circumstances, the wife's saying that the son was to have the estate after her was resolved to be a good assent.—They also cited *Hinson v. Button* (f).

Mr. *Anderson* and Mr. *Glasse*, for the defendant Bovill.

Mr. *Atkinson*, for the defendant Edwin Trail.

Mr. *Russell*, in the course of his reply, referred to *Lepard v. Vernon* (f).

The VICE CHANCELLOR.—It has been said that Mrs. Salmon, who was the only person that in her lifetime proved the will of the original testator, or acted in his executorship, was not capable of assenting to the specific

(a) 3 P. W. 12.

(b) Plowd. 539.

(c) 3 B. & Ad. 675.

(d) If the testator have lands, &c.

(e) 1 Lev. 25.

(f) 2 Roll. Rep. 158.

bequest in question, so far as it was in favour of the testator's children. To this argument I cannot accede. I cannot understand why, upon any rule of convenience, of justice, of law, or equity, it should have been incompetent to her to separate and set apart from the general mass of the testator's personal estate the chattel that he specifically bequeathed, and to appropriate it to the purposes for which he bequeathed it. That it is essential to the efficacy or validity of an assent to a bequest, that it should confer a legal interest, or affect the merely legal title to the subject of that bequest, I have never heard and do not believe. To maintain such a proposition is required neither by authority nor by principle. True, the children were only to take the proceeds of a sale of the leaseholds in question, to be made by the personal representative, for the time being, of Mr. Salmon, after Mrs. Salmon's death. But that disposition in their favour was part of the same specific bequest which made Mrs. Salmon specific legatee for life of the same leaseholds ; she could not, therefore, assent to the specific bequest, as it related to herself, without, at the same time, assenting to the specific bequest as it concerned the children. Why was she to be unable to assent to it as far as she was concerned? Why was the matter to remain open all her life? Why may not a power to be exercised over a particular chattel, at a future period, for the benefit of individuals named, be the matter, properly, of specific gift in a will? Why should it make any difference that the power in this case could not, without the consent of all interested, be exercised until after Mrs. Salmon's death? I am clearly of opinion that she was capable of assenting to the bequest so far as it concerned her children, as well as herself. I may observe that in the case in *3 B. & Adol.* the assent, though complete, did not affect the legal interest in the chattel, except as it made the executor assenting, himself the legatee of it in trust ; and that in the *Attorney-General v. Potter*, as I understand it, there was not any

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specific gift or specific disposition except as to the life interest given in the chattel there in question, which, subject to that life-interest, was, as I apprehend, merely a part of the general residue. Did Mrs. Salmon then assent? It is admitted that she lived two years after she had taken probate of her husband's will. During that time she appears to have been active in respect of his assets. I can see no ground for believing that she was defectively or inaccurately informed as to them, or as to his circumstances; or that it was contrary to her duty or to her interest to assent to the specific bequest; but I do see grounds for thinking it probable that it was consistent with her duty and interest to assent to it. There is no proof that she at any time said or did any thing at variance with the notion that she assented fully to the dispositions of her husband's will as to the leaseholds in question. But there is evidence of conduct on her part during the two years which, if not conclusive, has at least a tendency in favour of the inference that she so assented—conduct, I mean, besides and independently of the conversations with Mr. Greaves and Mr. Groom, to which those witnesses depose. They may not be exactly accurate, but I see no reason to distrust their substantial accuracy in their representations of those conversations. Coupled with the rest of her conduct and acts in evidence, they satisfy me that, clearly upon the old authorities, and consistently with the later authorities, with justice, and with principle, she may and ought to be held to have fully and completely assented to the disposition in question, as it concerned both herself and her children. I say this, without forgetting the rule, as I believe it to be, that where an executor, who is also a specific legatee, does an act respecting the subject of the specific bequest, which is referable to either character, which is consistent with the notion of assent and with its absence, that shall not be held to prove or amount to an assent. The fullest observance of that rule does not, in my judgment, require it to

be held in the present case, that Mrs. Salmon did not assent.

If I am right in this, the question of any assent on the part of Mr. Bull is immaterial, or is scarcely material. He did not, it is true, prove or act as executor in Mrs. Salmon's lifetime, but he was in her lifetime aware of certain matters concerning the testator's estate and took probate, as he did in November, 1836, not without having become, if not fully, at least to some extent, apprised of its condition and her dealings. Bearing this in mind, and considering what his acts and conduct, after as well as before her death, appear to have been—acts and conduct in which I include the deed of 1839, executed by him and Mr. Bovill, the administrator of the residuary legatee, I am not satisfied that Mr. Bull did not, as far as he could, assent (I mean unconditionally assent), to the specific gift to Mr. Salmon's children likewise: on the contrary, my impression is, that he did.

It is the less unsatisfactory to me to arrive at such a conclusion upon the materials before me, (which the parties' advisers seem to have been united in thinking sufficient, if not the only valuable materials obtainable upon the question of assent), inasmuch as those materials seem to me to shew, I do not say a certainty, but a probability, that if Mrs. Bull has any just claim in respect of Mr. Bull's connexion or dealings with Mr. Salmon's estate, she has, and will still have, the means of recovering it. I may add the single remark that the administrator of Mrs. Salmon has not only not excepted to the report, but has by his counsel argued in support of it.

DECLARE, that Mrs. Salmon, in her lifetime, as executrix of Charles Salmon, was capable of assenting, and did assent, to the bequest affecting the leasehold property in East-street and Dorset-street, made by his will in favour of herself and his children; and the defendant Catharine Bull, alleging that the assent of Thomas Bull to such bequest was necessary to

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perfect or complete the title of the plaintiff, as one of such children, to the benefit of the bequest, and was not given, Declare, upon the facts and circumstances of the case, that that proposition cannot be sustained; and let the exceptions, so far as they are not consistent with the declaration, stand overruled. Reserve judgment on the exceptions in all other respects. Liberty to apply in the interim.

July 9th.

CLAYTON v. LORD NUGENT.

This Court will, by consent of the parties to a suit, allow a verdict on an issue to be made the subject of a proceeding in error.

ON the hearing of this cause, on the 19th November 1841, before *Knight Bruce*, V. C., his Honor directed the following issue to the Court of Exchequer, in which *Henry Hugh O'Donel Clayton*, one of the defendants in equity was to be the plaintiff, and the plaintiffs and all other parties to the suit in equity, claiming under a certain indenture of settlement of the 31st August, 1829, except *Henry Hugh O'Donel Clayton*, were to be the defendants: Whether *Sir Gilbert East*, late of *Hall Place*, in the county of *Berks*, *Bart.*, deceased, devised his freehold hereditaments in the county of *Suffolk*, or any interest therein, to the defendant *Henry Hugh O'Donel Clayton*. And after provision made for certain admissions at the trial, it was ordered, that if the jury should find any special matter, the same should be indorsed on the record, and the parties were to be at liberty to take either a special case or a special verdict.

The issue came on to be tried at *Westminster*, in *June*, 1842, before *Lord Abinger*, C. B., when it was found by the jury that a certain card, which was in evidence at the trial, did not exist before the execution of the will of *Sir G. East*, and a verdict was entered for the defendants, subject to a special case. A case was accordingly drawn up and signed by counsel, and, with the sanction of the learned

Judge who presided at the trial, the following paragraph was placed at the end of it, and formed part of it:—"It is mutually agreed, that, in order to obtain the opinion of a court or courts of error, either party shall be at liberty to bring the case before a court of error, as if a bill of exceptions to the admissibility of the card in evidence had been regularly tendered and accepted, and sealed by the learned Judge; and a verdict to be entered for the plaintiff or defendants, according to the ultimate judgment of the admissibility of the card in evidence for the purpose aforesaid."

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The case was fully argued *in banco*, in the Court of Exchequer, on behalf of the plaintiff at law, when the Judges, without hearing the other side, decided against the plaintiff, and accordingly certified that they were of opinion that Sir Gilbert East did not devise his freehold estates in Suffolk, or any interest therein, to Henry Hugh O'Donel Clayton.

The case now came on for further directions upon that certificate.

Mr. *Wigram*, Mr. *T. F. Ellis*, and Mr. *Malins*, for the defendant Henry Hugh O'Donel Clayton, contended, that, under the form of the decree in this Court, and by the terms of the agreement comprehended in the case, their client was entitled to the benefit of the opinion of a court of error. By the decree the parties were to be at liberty to take a special case or a special verdict; and a writ of error was incident to the latter mode of proceeding. [The *Vice-Chancellor*.—The decree was probably so framed by arrangement between the parties in order that either of them might have the benefit of the opinion and reasons of the Court of Exchequer—a benefit which the parties would not have had in the ordinary course upon an issue *devi-savit vel non*. But how is a bill of exceptions connected with the trial of an issue?] It is submitted, that, by con-

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sent, (and there has been consent in this case), a bill of exceptions or a proceeding in the nature of a bill of exceptions may be had upon the trial of an issue: *Arnstrong v. Lewis* (a). And here the parties have bound themselves to that course of proceeding in order to have the benefit of the decision of a court of error.

Mr. *Simpkinson*, Mr. *Swanston*, Mr. *Russell*, Mr. *Peterdorff*, Mr. *Caley Shadwell*, Mr. *Stinton*, Mr. *Glasse*, Mr. *Shepherd* and Mr. *C. Roupell* for the defendants, contended, that it was not competent to the parties to bind themselves to an irregular proceeding; and that a bill of exceptions, and consequently an agreement to have the benefit of a bill of exceptions upon the trial of an issue, was contrary to the practice of the courts.

It was admitted at the bar, that, in the event of the case proceeding at law, the evidence would not be subject to any variation, and that the parties to the suit were all *sui juris*.

The VICE-CHANCELLOR said, that, but for the case which had been cited, he should have thought it inconsistent with the course of the court, even with the consent of the parties, to sanction a proceeding by bill of exceptions or any other proceeding in error, upon the trial of an issue. It appeared, however, that in that case an experienced judge of this court had, on the waiver of the parties, allowed a verdict on an issue to be made the subject of a proceeding in error. Acting upon that authority, his Honor said that he should, under all the circumstances of this case adopt the agreement of the parties, rather than, by rejecting it, render all the proceedings which had taken place at law a nullity. Upon the application, therefore, of the

(a) 3 M. & K. 45 ; 2 C. & M. 274.

plaintiff at law, now no longer an infant, and upon the representation of his counsel that he desired to have the benefit of the agreement, and the other parties not opposing the application, his Honor said that he would give a direction in conformity with the agreement; with liberty to any of the parties to apply.

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FLINN v. JENKINS.

July 20th.

ROBERT FLINN, by his will dated the 22nd May, 1830, disposed of his property in the following terms:—
“I, Robert Flinn of Stacey-street, Compton-street, St. Giles-in-the-Fields, in the county of Middlesex, carver and gilder, do will the whole property belonging to me, not named in this my last will, to my wife Sarah Flinn, after her paying the following legacies; that is to say—The house, No. 3, Stacey-street, I give to my son Robert Henry Flinn; the house No. 2, Stacey-street, I give to my son Henry Flinn for their lives, and then to be equally divided among their children. My son Henry Flinn is indebted to me, money lent, £2000; the interest of which he is to pay to my wife Sarah Flinn *as long as she lives*. The residue of my remaining property, in the following manner, except the household furniture, plate, and wearing apparel, trinkets, &c., to be at her own disposal, and the remaining property to be equally divided between my two sons for their lives only, and then to be equally divided among their children, when of age. I appoint my son Robert Henry Flinn, and my son Henry Flinn, executors, and my wife Sarah Flinn executrix.”

Upon the construction of a will—*Held*, that an absolute gift of the residue to the testator's widow was cut down by subsequent expressions, to a life-interest.

Held, also, that the children of the testator's two sons took interests in the residue, *per stirpes*.

The two sons and the widow survived the testator. Both the sons had children, of whom all survived their

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fathers and the widow. Upon the death of the widow, who survived the two sons, the present bill was filed by the adult children of Robert Henry Flinn, against the executors of the widow, the children of Henry, and the infant child of Robert Henry, praying, that the rights of the parties under the will might be ascertained and declared.

The questions raised were, first, whether the widow took an absolute interest, or an interest for life only, in the residue; secondly, whether the children of the sons took an interest in the houses, and an interest (if any) in the residue, *per capita* or *per stirpes*; thirdly, if they took an interest in the residue, whether it vested immediately, or not until they attained their majority.

Mr. *Spurrier*, for the plaintiffs.

Mr. *Russell*, Mr. *Metcalf*, and Mr. *Malins*, for the several defendants.

The VICE-CHANCELLOR was of opinion, that the widow was entitled to the residue for her life only, and that the children of the sons were entitled to the shares of the parents in the houses and in the residue *per stirpes*. His Honor added, that he was disposed to think that the shares of the children in the residue would not be vested until their majority; but that it was unnecessary to decide that question at that stage of the cause.

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BURGESS v. BURGESS.

July 25th.

THE late Bishop of Salisbury, Dr. Burgess, after certain specific and pecuniary bequests to his wife and others, including the gift of a vase to his nephew, W. R. Burgess, devised unto his said wife, the Rev. T. S. Bright, G. W. Marriott, Esq., and the said W. R. Burgess, and their heirs, his freehold hereditaments upon trust for sale; and also bequeathed to them his leasehold premises and his personal estate, not specifically bequeathed, upon trust for conversion; and directed them to stand possessed of the proceeds arising from such sale and conversion upon the trusts afterwards mentioned. The testator then gave several legacies and annuities, after satisfying which, he gave the income of his property to his wife for her life; and, after her death, he bequeathed various other legacies; among which occurred the following:—To his said nephew W. R. Burgess £1000 sterling; to a lady who had lived with the testator and his wife some years £1000 sterling; and to each of his trustees, T. S. Bright, G. W. Marriott, and W. R. Burgess, the sum of £100, *as a mark of his respect for them*; all which legacies he declared to be vested at his decease, though not payable till the decease of his wife. The testator then gave £2000 upon trusts for two of his nieces and their respective husbands and families in equal moieties, and the residue of his property unto and equally between his sisters and nephews and nieces living at the time of his decease. And he appointed his said wife, and the said W. T. S. Bright, G. W. Marriott, and W. R. Burgess, to be executrix and executors of his will.

A legacy given to the testator's trustees and executors *as a mark of his respect for them*—Held, not revoked by a codicil appointing other trustees in their room, and giving a legacy of equal amount to the newly-appointed trustees and executors, in similar language.

By a codicil to his will, the testator, after reciting, that, by his said will, he had devised and bequeathed unto his wife Margery Burgess, and unto the Rev. T. S. Bright, G. W. Marriott, Esq., and to his nephew W. R. Burgess, his

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freehold hereditaments, leasehold premises, and per estate, not specifically bequeathed, upon certain trusts appointed them executrix and executors, revoked the devises and bequests, and the appointment of the said Bright, G. W. Marriott, and W. R. Burgess, as trustee executors of his will, and devised and bequeathed his freehold hereditaments, leasehold premises, and per estate aforesaid, unto his said wife Margery Burges Rev. Liscombe Clarke, Archdeacon of Sarum, and the Christopher Fawcett, and the survivors, &c., upon the expressed in his will, and appointed them executrix executors. He then gave to each of his said trustee executors Liscombe Clarke and Christopher Fawcett sum of £100, *in token of his respect for them*, and directed the same to be paid at the decease of his said wife.

One of the questions in the cause was, whether the legacies contained in the testator's will of £100 to each of those whom he had first appointed trustees jointly with his wife were revoked by the codicil, which substituted other trustees in their place.

Mr. *Wigram* and Mr. *Boyle*, for the plaintiff, observed that, in the bequest to the persons who were appointed trustees and executors by the will, they were expressly called trustees; and that a legacy of much larger amount having just before been given to one of them who was the testator's nephew, it must be presumed that those legacies were given to them, not in their individual but in their fiduciary character, and, consequently, that the revocation of their appointment as trustees was also a revocation of the legacies which had been given to them in that capacity. See *Reed v. Devaynes* (a), *Dix v. Reed* (b), *Piggott v. Green*

Mr. *Simpkinson*, Mr. *Russell*, Mr. *Toller*, and Mr. *H*

(a) 2 Cox, 285.

(b) 1 S. & S. 237.

(c) 6 Sim. 71.

Clarke, for some of the defendants in the same interest, adopted the same line of argument.

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Mr. Cooper and *Mr. Jenkins*, for the legatees.

Mr. Faber for other parties.

The VICE-CHANCELLOR.—Supposing the codicil not to have existed, the only circumstance, I think, tending to create a doubt as to the character of the bequest to the persons named as trustees in the will is, that which has been adverted to, namely, that one of the legatees is a nephew of the testator, and entitled to other benefits under the will. I do not, however, think that circumstance of sufficient weight to countervail the plain import and effect of the bequest to these gentlemen (though they were truly called trustees) as a mark of the testator's respect for them. As to the codicil, the testator makes it with the will before him, and so making it, he might have revoked the legacies given by his will. He, however, does not do so. He gives the general property to other persons upon the same trusts as are declared by the will, which trusts are to pay the legacies. I think it would be too great a stretch of refinement to say, that, because other persons are appointed trustees—because to them also he gives legacies equal in amount to the former, in token of his respect—therefore, the former legacies are revoked. I think that these legacies are due.

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or any adjournment thereof, should have full power and authority to declare a dividend or dividends out of the clear surplus of the income and profits of the society, or to withhold the same if they should think fit, or to make any other appropriation of the income and profits, or any other part thereof, they might think expedient.

By the 20th clause, it was declared, that, "at any such general meeting, it shall and may be lawful for the proprietors of the said society, or such of them as shall then be present, either in person or by proxy, to ordain and make such and so many bye-laws, rules, orders, and ordinances, as to them, or the major part of them, shall seem necessary, convenient, and proper, for the regulation and good government of the said society, and of the members and affairs thereof, and for fixing and determining the number of, and the manner of electing, the members of the committee of management and auditors of the said society, and the period of their continuance in office, and the manner and time in which any vacancies in the committee of management, or amongst the auditors, by death, resignation, disqualification, or otherwise, shall be supplied, and for settling and fixing the terms and conditions and the manner in which persons not proprietors may be admitted as subscribers to the hall and library and other rooms of the said society, or any of them, or any part thereof, and for convening any special meetings of the proprietors, and generally for carrying the objects for which the said society is founded into full and complete effect, with reasonable penalties, fines, and amerciaments, to be contained in such bye-laws, on the offenders, for non-performance of, or for disobedience to, the same; and the said bye-laws, rules, orders, and ordinances, penalties, fines, and amerciaments, or any of them, from time to time to alter, change, or annul, as the said general meeting shall think requisite, and to mitigate the same as they shall find cause, so as all and singular such bye-laws, rules, orders, and ordinances, penalties, fines, and amerciaments, be rea-

sonable, and not repugnant or contrary to the laws and statutes of this our realm.”

By the 23rd clause it was declared, that, at any general meeting, every member should be entitled to one vote for every share held by him, and that the majority of the votes of the members present, either in person or by proxy, should decide upon all questions propounded at such meeting.

In accordance with the provisions of this charter, the society was formed, a capital of £50,000 was raised, and a piece of land was purchased in Chancery-lane, upon which was erected a building, comprising a hall and library, and other rooms for the purposes of the institution.

At a special general meeting of the society, held on the 22nd August, 1843, the following resolutions were passed : —“ Resolved unanimously, that the present charter of incorporation of the society, with all the rights and privileges thereby conferred, be surrendered into the hands of her Majesty. That the common seal of the society be affixed to a proper deed or instrument for effecting the surrender of the said charter, and that such deed or instrument, when duly sealed, be inrolled in the Court of Chancery. That, in order to prevent any question from arising as to the devolution of the corporate property, upon the dissolution of the society, by the surrender of the present charter, the committee be authorized, previously to such surrender, to affix the common seal of the society to all such deeds or instruments as may be necessary for the purpose of vesting all the property of the said society, as well real as personal, in trustees, to be named by the committee, upon trust for the said society, and to permit and suffer the same to be used and enjoyed for the purposes thereof until the surrender of the present charter ; and from and immediately after such surrender, and in the meantime, and until a new charter of incorporation shall be granted, upon trust for such persons as, at the time of the surrender of the present charter, shall be members of the

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present society; and from and immediately after the granting of such new charter of incorporation, upon trust to convey and assign the same unto the society incorporated by such new charter, their successors and assigns."

The draft of a new charter had been prepared by the committee of management of the society, and contained the following recital:—"And whereas it hath been represented to us, that the existence of a capital or joint stock, in which the several members of the society have individual right of property, and from which they may derive pecuniary benefit, is no longer suited to, or consistent with, the important duties which have been confided to the management of the society; and that it is expedient that the constitution of the society should be re-modelled; and that the members thereof should not any longer possess any individual right of property in its capital or possessions, nor be entitled to derive any individual pecuniary advantages from the subscriptions, rents, and fees payable to the society but that the whole income thereof should be applicable to the purpose of promoting professional improvement, and facilitating the acquisition of legal knowledge."

It was proposed, that the new charter should incorporate all the present members, and that the number of members to be elected into the society should be indefinite. The provision contained in the second clause of the existing charter was omitted in the draft of the proposed new charter.

Of 1318 shareholders of the society, who were competent to vote at the general meetings, it appeared that all had expressed their concurrence in the proposed change in the constitution of the society except twenty-two, which latter number included the plaintiffs, who were not present at the meeting of August, 1843. They now filed their bill against the corporation and its secretary, praying, that the said society, and the agents and officers thereof, might be restrained from conveying, assigning, or making over the real and personal property of the society, or any part there-

of, to any person or persons, upon and for the purposes mentioned in the resolutions of the 22nd August, 1843, or any of such purposes, or in any other manner, in furtherance of the intention of the society to surrender the existing charter; and from affixing the common seal of the society to any deed or instrument for such purposes, or any of them; and from surrendering the existing charter, and affixing the common seal of the society to any deed or instrument for that purpose; and from accepting a new charter, according to the said draft, or otherwise inconsistent with the existing charter of the society.

A motion for an injunction, in accordance with the terms of the prayer of their bill, was now made on behalf of the plaintiffs. The proposed new charter had been approved of by the law officers of the Crown.

Mr. *Russell* and Mr. *James Parker*, for the motion.—The attempt made by the defendants to change the whole constitution of this Society, without the consent of every member, cannot be allowed by a court of equity: *Adley v. The Whitstaple Company* (a). One of the objects of this Society of Attornies is, “the better and more conveniently discharging their professional duties.” The building in which the society meets was intended for, and is used as, a place of business. Notices are left there, and deeds kept in places of security. According to the proposed scheme, these objects are to be abandoned, in favour of a general and indefinite plan of “professional improvement.” In addition to which, a total change is to be effected in the property of the society. At present, its constitution is that of a joint-stock company, possessing a limited number of shares, upon which a profit is contemplated. Each proprietor is entitled to a vote for each share up to the number of twenty. The shares devolve to executors and legatees,

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provided, that they do not succeed to the condition of share holders. But, if, in pursuance of the new charter, an unlimited number of shares be created, the notion of proprietorship is at once put an end to. The resolution of August, 1843, amounts to a notice of an intended breach of trust; it shews an intention in certain persons, without the consent of all the parties interested, to alienate the trust property to persons unknown, who are to hold it till the time comes for stripping the plaintiffs of their rights. On the plain principles of this court as to trusts, your Honor will grant the injunction.

Mr. *Wigram* and Mr. *John Adams*, for the defendants—It is unreasonable that the wishes of the great majority of the members of this society should be thwarted by the proceedings of a few individuals: it is more to the interest of the society that it should be devoted to professional improvement, than that it should be engrossed in considering the profits of shares. In the former case, it may command the confidence of the public, but in the latter, it cannot. If the injunction be granted, it can only have a temporary effect; for, supposing these defendants should be prevented from obtaining their new charter, there is nothing to prevent their applying to Parliament for relief. It is incident to their rights as a corporation to resort to Parliament for a change in their constitution: *Ware v. Grand Junction Water-works Company* (a). Much has been

(a) 2 Russ. & M. 470. It appears that an injunction will not lie to restrain proceedings in Parliament after the bill has been entertained by either House of Parliament. See *Attorney-General v. Manchester and Leeds Railway Company*, 1 Railw. Cas. 436, 458; *Ware v. Grand Junction Water-works Company*, supra; *Mayor of King's Lynn v. Pember-*

ton, 1 Swanst. 244. And Lord *Cottenham* seems to doubt whether a bill will lie to restrain presentation of a petition for an act of Parliament. (See *Attorney-General v. Manchester and Leeds Railway Company*). But in *Frederick v. Coxwell*, 3 Y. & J. 514, it was held, that an agreement to present a petition to Parliament for an act might be specifically performed.

said about the proprietary rights of the shareholders of this society, and the intended destruction of those rights; but it may be doubted, whether, under the 19th clause of the present charter, any such rights do in strictness exist; but even if they do, the plaintiffs, having joined a corporation, must take the consequences. It is incident to a corporation, that the majority of members may direct the use of the corporation seal: *Com. Dig. Franchises*, (F. 11); and what is there to prevent the corporation seal from being set to the surrender of the charter?

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The VICE-CHANCELLOR.—Certain gentlemen have associated themselves together for the purpose of founding an institution “for facilitating the acquisition of legal knowledge, and for better and more conveniently discharging their professional duties;” and they subscribe and pay considerable sums of money for carrying on the undertaking. They have purchased a piece of land in the county of Middlesex, and they have caused to be erected on it a building, comprising a hall and library, and other rooms for the various purposes of the institution. On this footing they ask and obtain a charter of incorporation from the Crown, which, of course, must be understood to be for the purposes that I have mentioned. It gives the usual powers to acquire and to alienate property; and it is part of the charter, “That the capital or joint stock of the society to be used and applied in establishing and carrying on the undertaking, and, for the purposes aforesaid, shall consist of the sum of £50,000 sterling, divided into 2000 shares of £25 each, and of such further sum, not exceeding the sum of £25,000, as may, pursuant to the resolution of any general meeting of the proprietors of the said society, be raised by creation and sale of new shares, under the authority for that purpose hereinafter contained.” And to the extent of the £50,000, as I understand it, the capital has been all provided. Two or three or more of the shares

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of this society are represented by the plaintiffs. The charter contemplates the possibility or probability of profit arising, and a division of profits among the shareholder who have contributed this capital. It gives, however, power not to the ordinary governing body, but to the general meeting, "to withhold the income, or to make any other appropriation of the income or profits, or any part thereof which they may think expedient.

Now, of course, such a corporation as this must be governed; and the 17th clause provides a committee of management: and, among certain functions which are detailed, but which it is not material now particularly to notice, they have this general power:—"To do all such act as shall appear to them necessary or fitting to be done in order to carry into full operation and effect the objects and purposes of the society, so always, that the same be not inconsistent with, or repugnant to, the provisions of this our charter, or any existing bye-law, ordinance, or regulation made, ordered, or agreed upon, at any general meeting of the said society, or the laws and statutes of this our realm." Now, certainly, one cannot imagine anything more repugnant to worldly existence, either natural or artificial, than death, whether natural or civil. There is, however, a higher and more extensive governing body, namely, the proprietors at a general meeting, the powers of which are defined by the 20th clause or section. "At any such general meeting, it shall and may be lawful for the proprietors of the said society," &c. [His Honor here read the 20th section.] It thus appears that the proprietors at a general meeting have power to ordain and make, and also to alter and annul the bye-laws, rules, and ordinances of the society; but the purpose of the bye-laws, rules, and ordinances, as stated in the former part of the clause or section, is "the carrying the objects for which the said society is founded into full and complete effect."

Now, subject to an observation that I shall presently

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make, to the effect that I do not mean to decide any of these points now, it seems to me, that there is nothing more said with regard to the use of the common seal than is here expressed; that the use of the common seal is confided either to the committee or to the general meeting, as, in different modes, and under different circumstances, the governing bodies respectively may think fit to use it; and that the powers of the committee and of the general meeting to direct the use of the common seal are limited by conditions, which are inconsistent with the notion of applying the common seal for the purpose of procuring the annihilation of the society thus constituted. The law allows a corporation having perpetual succession and continuance to be constituted; the law allows subjects, with the consent of the Crown, to purchase that right from the Crown; the law allows individuals to acquire a beneficial interest in the preservation of such a body so lawfully constituted. And, if these things be so, I am not aware of any principle of law or equity which can enable that lawfully-constituted interest, thus obtained, to be taken away, without the consent of every person interested, unless by means of a condition to which the original creation was subject. I can find no provision warranting this act embodied in the creation of the institution, and it is plain that there are persons interested in the continuance of the society who object. I am not prepared to say, that it can be in the power of any person or persons, to whom the general authority of using the common seal is entrusted, to use it, without at least the consent of every member of the corporation, for the purpose of changing the nature of the institution.

It cannot be said that it was an immaterial purpose of the present institution, to assist and advance the better and more convenient discharge of the professional duties of the members. That is an object totally sunk and relinquish-

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ed upon the plan of the new institution, for which there is substituted the general object (laudable in itself, no doubt) of promoting professional improvement. General it may well be called; the expression is so large, that it seems to me impossible to define its limits, at least without being perfectly assured of the sense in which the term is intended to be used by those who use it.

The case, however, does not stop here; for the present institution, in which the plaintiffs before me have lawfully purchased a valuable interest, (a valuable interest in the nature of property), does not, as I collect, authorize the possible introduction of any greater number of persons into the corporation than 3000, and at present they are under 2000. It is not at all likely, considering the number of shares that each individual holds, that they will exceed 2000, still less likely that they will approach 3000; but the number of 3000 they cannot, as I am informed, and, as I believe, rightly informed, exceed. Now, the first point which struck me upon this proposed new charter is, that the number of members of the society shall be indefinite. Is this object, from whatsoever motives, for however good reasons, on the part of men however respectable and honourable—is this object one that can be allowed to be effected against the consent of some persons lawfully interested in opposing it? It seems to me, at present, not.

The two substantial objects of the present application are, to prevent the destruction of the corporation, and to prevent that alienation of the property of the corporation which is proposed for no purpose except its destruction. If such opinion as I have at present formed were more favourable to the case of the respectable defendants than it is, I could not allow the property to be so importantly affected before the hearing of the cause. It seems to me, that to do so would, in the strongest sense of the term, be an irremediable act. How could I, or any court in the

kingdom, restore these plaintiffs to their original position, if the act now sought to be restrained were done?

Therefore, without pronouncing any conclusive opinion on this question, which is a very important one,—reserving to myself full liberty, if, on further argument and consideration, it shall seem to me right to do so, to decide against the plaintiffs in this case,—I see quite enough to render it a plainly proper and unavoidable course to grant the injunction as prayed, in this stage of the cause, without prejudice to any future question.

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THIS suit was instituted for the administration of the estate of a testator, Simon Gray, who had bequeathed legacies for charitable purposes. The Master having reported that thirteen old shares, and five new shares of £50 each in the London Gas-light and Coke Company, part of the estate of the testator, were pure personal estate, an exception was taken to his report by the defendants, other than the Attorney-General, on the ground that such shares were within the third section of the Mortmain Act, (9 Geo. 2, c. 36), whereby it is enacted, that “all gifts &c. of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments,” to or in trust for any charitable uses, which shall be made in any other manner or form than by the act is directed and appointed, shall be void.

The shares in the London Gas-light and Coke Company are not within the Statute of Mortmain.

By the stat. 50 Geo. 3, c. clxiii, s. 1, reciting, that inflammable air and other materials may be procured from coal,

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and the probable use to which such matters may be applied it is enacted, that, in case the Crown, by charter, "shall think fit, within three years after the passing of this act, to declare and grant, that such and so many persons as shall be named therein, and all and every such other person or persons as from time to time shall be duly admitted members into their corporation, shall be a body politic and corporate, by the name of 'The Gas-light and Coke Company,' to continue for and during the period of two years or one year or more years from the time of granting such charter; and to declare, that the said corporation so to be made and created shall be established for the purpose of producing in and from coal mable air, coke, oil, tar, pitch, asphaltum, ammoniacal liquor, and essential oil from coal; such corporation shall have power to make contracts with any commissioners, directors, or trustees, having the control, direction, and management of the lighting of any of the parishes or extra-parochial places within the cities of London and Westminster, or the borough of Southwark, or any of the liberties or precincts thereof respectively, or any persons or bodies politic or collegiate, corporations aggregate or single, willing and desirous of contracting with the said corporation for the lighting of any such parishes or places, or streets, squares, public market-places, or manufactories, or private houses, or places of public exhibition within said parishes, or extra-parochial places situate within said cities or liberties thereof, or liberties or precincts aforesaid, and to sell and dispose of such coke, oil, pitch, asphaltum, ammoniacal liquor, and essential oil, and all other products arising from coal, under such conditions, limitations, and restrictions as shall be expressed and contained in such charter, and as are hereinafter expressed."

The 2nd section enacts, that it shall be lawful for the said corporation to raise and contribute amongst the

selves a capital or joint stock, to be applied and used in establishing and carrying on the undertaking and purposes aforesaid, not exceeding the sum of £200,000 sterling, to be subscribed in shares of £50 each.

The 5th section enacts, that, in the said charter for establishing the said corporation, it shall be provided, that all and every person or persons for or by whom any subscription shall be made or accepted, or any payment made to the orders of any general court or courts authorized by the said charter to be held by the said corporation for that purpose for or towards the raising the said capital joint stock as aforesaid, his, her, or their executors, administrators, and assigns respectively, shall have and be entitled to a capital share of and in the said capital joint stock of the said corporation, in proportion to the monies which he, she, or they shall have so contributed towards making up the same, and to a proportional share of the profits and advantages attending the capital stock of the said corporation, and shall be admitted to be a member or members of the same.

By the 7th section, it is enacted, that the sum to be so subscribed shall be divided into shares of £50 sterling each, and that no person or persons shall be a subscriber or subscribers for a less sum than £50 sterling each, and that all shares in the joint stock and undertaking of the said corporation, and in the net profits and advantages thereof, shall be deemed personal estate, and not of the nature of real estate, and, as such personal estate, shall be transferable accordingly.

The company was incorporated by charter, dated the 30th April, 1812. The other acts of Parliament relating to it are the 54 *Geo.* 3, c. cxvi, the 59 *Geo.* 3, c. xx, and 4 *Geo.* 4, c. cxix.

Mr. *Russell* and Mr. *Glasse*, for some of the excepting

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parties, distinguished the present case from *March v. The Attorney-General* (a), on the ground that the policies of assurance in that case merely represented a right to receive a sum of money from a company which had an interest in land: here, the whole purposes of the company necessarily involved a dealing with land. In that respect this case also differed from *Attorney-General v. Giles* (b). The circumstance of this company being incorporated made no difference. The effect was merely to substitute an artificial body as a trustee for the shareholders. The case of *Collinson v. Pater* (c) was much stronger than the present. There it was held, that a judgment debt due to a testator would not pass by this will to a charitable use, but was within the Mortmain Act; the sole ground of the decision being, that it had in the testator's lifetime been reported in a creditors' suit to be an incumbrance affecting his real estate. *Rex v. Bates* (d), *Attorney-General v. Lord Weymouth* (e).

Mr. *Malins* and Mr. *Welford*, for others of the excepting parties.

Mr. *Simpkinson* and Mr. *Hubback*, for others of the excepting parties.—The act of the 50 *Geo. 3* makes these shares personal estate; but, though personal estate, they are in the nature of an interest in land, like leaseholds. It is difficult in principle to distinguish this case from that of shares in the New River Company. [The *Vice-Chancellor*.—Those shares are inheritable.] There are other cases, as in *Negus v. Coulter* (f), where the right passed to the executor, and yet it was held to be an interest in land, and within the Statute of Mortmain. It is

(a) 5 Beav. 433.

(b) 5 Beav. 436, cited.

(c) 2 Russ. & M. 344.

(d) 3 Price, 341.

(e) Ambl. 20.

(f) Ambl. 367.

immaterial in the construction of that statute, whether the interest consists of a term for years, or a fee. The judgment of Lord *Alvanley* in *Knapp v. Williams* (a), and the decision in *Ex parte The Vauxhall Bridge Company* (b), apply to this case. *Bligh v. Brent* (c) and *Attorney-General v. Giles* are distinguishable. In the latter case, as reported in *Shelford* (d), Lord *Cottenham* proceeded on the ground that the shareholders had only a right, under the terms of the statute, to recover a per centage on the profits. Here, the profits themselves, the original subject-matter of the shares, are an interest in land.

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Mr. *Swanston*, Mr. *Wigram*, Mr. *Bagshawe*, and Mr. *Austen* appeared for other defendants.

Mr. *Twiss* and Mr. *Wray*, for the Attorney-General, were stopped by the Court.

THE VICE-CHANCELLOR.—This question relates to shares in a trading corporation, constituted and regulated by a variety of acts of Parliament, one of which makes the corporation perpetual, and by one or more of which the acquisition of landed property in fee-simple by the corporation is authorized. Beyond the observations that I have made, it is sufficient for the present purpose to refer with particularity to some provisions of the earliest of those acts. [His Honor then read the several sections of the stat. 50 *Geo.* 3, as before set out, and proceeded as follows:—]

I observe in passing,—without saying whether it is important,—that this act does not simply provide that the shares shall be deemed personal estate, (which would have

(a) 4 *Ves.* 430, n.
 (b) 1 *G. & J.* 101.

(c) 2 *Y. & C.* 268.
 (d) *Shelf. Mortm.*, Appendix.

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been sufficient for the mere purpose of devolution), but it says—"shall be deemed personal estate, and not of the nature of real estate, and, as such personal estate, shall be transferable accordingly." I make the remark in passing, without saying whether I should or should not have decided this case in the same way if those particular words had not been inserted in the Act. At present it is sufficient to say, that, in my opinion, the words are not to be disregarded.

Now, shares thus constituted are the shares in question; they are shares in a joint stock to be contributed by various persons, who are to combine in raising the sum for trading purposes. Being applied to trading purposes, the profits and advantages attending the capital stock that may be derived from trading are to be divided among the contributors. The only connexion of this concern with land, beyond the mere circumstance that all trades must be carried on in connexion with the earth on which we live, is, that it is to be carried on with the assistance of real property, to be acquired by the corporation. The shareholders are to have no estate in the real property, legal or equitable, but real property is to be held by the corporation as part of the general mass of the corporate property, real and personal, which being held and worked by the corporation, the net profits are to be divided by them among certain individuals, not one of whom has, legally or equitably, any right of possession of the land, or of entry upon any portion of it. Speaking otherwise than technically, this would sound to any unlearned person a little like a landed estate in a shareholder, as foreign, in respect of the shareholders, from any notion of what is called landed property, as anything that one can well imagine. No man would think, certainly, of calling an extensive holder of gas-light shares a great landed proprietor.

But it is said, that property of this description, because

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the profits are acquired by a certain connexion with the earth, with the aid of real estate held and managed by the corporate body, who receive the profits, and with them or from them make dividends among the individual shareholders, is, as to the individual shareholders and their interests, a tenement or a hereditament, or an estate or interest in a tenement or a hereditament, or a charge or incumbrance upon a tenement or a hereditament, or an estate or interest in that charge or incumbrance. Now, it is possible, that, by an exceedingly strict interpretation of the term, property of this description in a shareholder might, in a sense and for a purpose, be brought within the range of a portion of those expressions: it is possible; but the question is, whether, upon a just interpretation of the whole of the act of *Geo. 2*, without regarding the title, which I do not regard for this purpose,—whether, upon a just and rational collection, from the language of the body of the act, of its intention, it is a sound construction of this statute to say, that the expressions “lands, tenements, or hereditaments,” or “charge or incumbrance affecting lands, tenements, or hereditaments,” or “estate or interest therein,” as used in it, are words properly applicable to a subject of this description. I am of opinion, that they are not; and without saying (nor is it necessary to say, and I hardly understand what the expression means) whether this property is pure personal estate, or not, I am of opinion, without any doubt, that it is property not falling within the range of any of the expressions contained in the stat. 9 *Geo. 2*, c. 36, according to a just interpretation of the language of that act.

THE cause now came on for hearing for further directions, when several questions on the construction of the will of the testator were discussed. .

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Testator, by his will, directed that the fourth part of the net annual income of his property (which was personal), should be paid in quarterly payments to the eldest son of E.; and that, on his decease, the quarterly payment of his annuity should be continued to his heir-at-law; and failing the latter by death, so on in like manner as long as there should be an heir:—

Held, that this was an absolute gift of one-fourth of the property to the eldest son of E.

Testator, by his will, directed the income of one-half of his personal estate to be paid in equal shares to the eldest sons of his sisters E. and M. At the date of the will, an eldest-born son of M. was living, but he afterwards

died in the testator's lifetime, leaving a second-born son of M. surviving him. After his and with knowledge of it, the testator, by a codicil, directed the trustees of his will to a certain sum among all the children then living of his sisters E. and M., with the exception of the two provided for in his will:—*Held*, that the second-born son of M. took the share by the will to her eldest son.

The testator, who was a native of Dunse, in Scotland, but at the time of his death resided in England, made his will as follows:—"First, I give, devise, and bequeath the whole of my real and personal property, whether consisting of lands, houses, public funds, manuscripts, or any other thing whatsoever or wheresoever situated, in fee simple for ever for the purposes hereinafter mentioned, to the following gentlemen respectively holding for the time being, as long as they shall hold them, the following offices in Scotland: the University of Edinburgh, (mentioning certain professorships), and along with them the minister for the time being of the Established Church of Scotland in my native town of Dunse, in the county of Berwick; secondly, this is the manner which I appoint for the distribution of the annual income of my said property for ever,—from the commencement of the fifth year, the above-appointed trustees shall set apart annually *£10 per cent.* upon the total income of the estate, to be invested as additional capital in some good and valid medium of profit or interest, in order that the new income derived from this may increase the benefits intended by the former. For further explanation on this point, they will consult a paper signed by me on the 19th March, 1830, marked 'Management of Gray's Trust or Fund.' [Here followed certain clauses marked respectively 3, 4 and 5.] 6. The income remaining after this deduction of *£10 per cent.* shall be divided into two equal parts. 7. One of these I direct to be divided into two equal parts also. The first of these latter, or the first part of the net annual income remaining after deduction of the aforesaid *£10 per cent.*, shall be paid in quarterly payments to the eldest son of my eldest sister Elizabeth,

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Thompson, who shall add the name of Gray to his own, and, on his decease, the quarterly payment of his annuity shall be continued to his heir-at-law, and, failing the latter by death, so on in like manner as long as there shall be an heir. And the second of these fourth parts of the net annual income shall, in like manner, be paid to the eldest son of my younger sister Margaret, Mrs. Allan, and, on his decease, to his heir-at-law, and, failing the latter by death, so in like manner as long as there shall be an heir. These successive annuitants, both of Mrs. Thompson's and Mrs. Allan's branch, shall all be required to add the name of Gray to their own name."

By a codicil to his will, dated the 15th June, 1839, the testator directed his trustees to draw from his estate or property a sum equal to the amount of two years of the income left by him at his decease, adding, "And they will divide and distribute equally, share and share alike, the said sum among all the children then living of my sisters Elizabeth Thompson and Margaret Allan, with the exception of the two provided for in paragraph or clause 7, within a twelvemonth after my decease, or as soon as conveniently can be."

At the date of the will, Elizabeth Thompson had two sons, the eldest of whom was the plaintiff, and a daughter, all of whom survived the testator. At the same date, Margaret Allan had several sons and daughters, John Allan being the eldest son. John Allan died in July, 1837, which was before the date of the codicil above stated; and it was admitted in the cause, that, at the time of making the codicil, the testator knew of his death. The other children of Mrs. Allan survived the testator. The testator died in 1842, having survived both his sisters.

The questions were, first, what interest was taken in the testator's property by the respective eldest sons of Mrs. Thompson and Mrs. Allan; secondly, whether, under the bequest to the eldest son of Mrs. Allan, the person who

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was her eldest son at the date of the codicil and of the death of the testator was entitled.

Upon this part of the case, *Seale v. Seale* (a) and *Cursham v. Newland* (b) were cited.

The VICE-CHANCELLOR.—Subject to the question as to the construction and effect of the directions with regard to the reservation and the qualified accumulation of £10 *per cent.* on the income, to which I shall advert by-and-by (c), the construction of the testator's testamentary instruments, in the respects which have been the subject of argument, appears to me to be thus :—The first question arises upon the disposition of the income of a moiety in favour of the eldest sons of the two sisters. It has been properly stated by Mr. *Twiss*, that an absolute gift of the annual income is an absolute gift of the body or subject from whence the income arises. The testator, after giving all his property, which, as I understand, includes considerable personal estate, but does not include any English real estate, directs it to be divided into two equal parts: he then says, “One of these I direct to be divided into two equal parts; the first of these latter, or the fourth part of the net annual income remaining after deducting the aforesaid £10 *per cent.*, shall be paid in quarterly payments to the eldest son of my eldest sister Elizabeth, Mrs. Thompson, who shall add the name of Gray to his own; and, on his decease, the quarterly payment of his annuity shall be continued to his heir-at-law; and, failing the latter by death, so on in like manner as long as there shall be an heir.” The use of the word “annuity” and the di-

(a) 1 P. W. 290.

(b) 2 Beav. 145.

(c) See post, p. 400. The *Vice-Chancellor* pronounced judgment at once upon the whole cause as

heard on further directions; but it has been thought convenient on the present occasion to report the various topics comprised in the judgment separately.

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rection for quarterly payments may be disregarded. It seems to me, that, according to the true construction of the instruments, this is a sufficiently plain gift of a fourth part of the property absolutely to the eldest son of Mrs. Thompson. I think that it is not a life estate: I think that the words "heir-at-law," and the words "so on in like manner, as long as there shall be an heir," ought to be treated as mere words of limitation, and as a mere amplification of the notion of an absolute interest. The person who was the eldest son of Mrs. Thompson when the will was made continued to be so at the testator's death, and survived him.

With regard to the other half of the moiety of his property, the testator says, "And the second of these fourth parts of the net annual income shall, in like manner, be paid to the eldest son of my youngest sister Margaret, Mrs. Allan, and on his decease to his heir-at-law; and, failing the latter by death, so on in like manner as long as there shall be an heir." The observations already made apply to that share also, subject to the question of the ascertainment of the person. It appears that the person who was the eldest son of Mrs. Allan at the time the will was made died in the testator's lifetime, a bachelor. She had a second son when the will was made, who was her eldest surviving son and heir-apparent at the time of the testator's death. It is unnecessary for me to say what I might have thought right,—if I know what I should have thought right,—had the last codicil, and the admitted fact to be taken in connexion with it, not existed. It is, however, an admitted fact, that the person who was the eldest son of Mrs. Allan when the will was made died before the codicil of the 15th of June, 1839; and it is an admitted fact, that, when the testator made the codicil of the 15th of June, 1839, he knew of the death. Considering that state of circumstances, and the terms of the codicil, I am

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of opinion that the eldest surviving son of Mrs. became entitled to this share.

Testator, by his will, after disposing of one-half of the income of his personal estate, gave the following direction as to part of the remaining half:—
“The sum of £50 sterling, more or less, shall be annually distributed in a weekly allowance of bread, amongst twelve poor old persons residing in the parish of D., with some occasional donations to them and to others.” By a codicil he directed that *at least two six-penny loaves* should be given every week to sixteen old persons, and that, on the annual return of his birth-day, each of these sixteen persons should receive a shilling loaf, &c. at the mausoleum which was to be erected to his memory:—

Held, that the clauses in the

will and codicil must be taken together, and that the effect of them was to make provision for the weekly gift of two sixpenny loaves to each of sixteen poor old persons in the parish of D., and for the annual gift of the shilling loaf, &c. to each of the sixteen at the mausoleum, if it should be erected, or some other convenient place.

THE rest of the testator's will was in the following terms:—
“8. The other remaining half of the said net income is to be direct to be disposed of in the following manner:—
The sum of £50 sterling, more or less, shall be annually distributed, in a weekly allowance of bread, among twelve poor old persons residing in the parish of Dunse, with some occasional donations to them and to others. 2. A sum not exceeding £50 a year shall be paid in quarterly payments to a literary man, preferably not less than 40 years of age. This man shall be selected by the aforesaid trustees, and the annuity shall be continued to his life, unless the trustees shall find reason, from his unimproper conduct, to discontinue him. 3-8. A sum not exceeding £40 a-year is to be given in money or in kind for the best essays in statistics, politics or government, criticism, and moral philosophy, &c., with reference to the doctrines maintained in my writings on those subjects. 4-8. The remainder of the said half, if any, shall be distributed in occasional sums to deserving literary men, or to defray expenses connected with my manuscript works. 9. I appoint my old and tried friends, Captain Isaac and William Sewell, Esq., of the Veterinary College, to act as executors of this my will, for the purpose of assisting in having the whole of my property put in the possession of my aforesaid trustees, for the purposes stated.” * * * *

With respect to the allowance of bread mentioned in clause 1-8 of the will, the testamentary paper referred to

by the testator in his will, after providing for a mausoleum to be erected to his memory, contained the following directions:—

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"The Bread Charity: With reference to the first of the three purposes for which the second half of the income is set apart in the will, after deducting £10 per cent. from the whole, let at least two sixpenny loaves be given every week to sixteen old persons. The population of Dunse parish is pretty equally divided into four religious classes, those of the Established Kirk or Church, those of the Antiburgher persuasion, those of the Burgher opinion, and those of the Relief. Perhaps, therefore, the present mode of selection will be the preferable,—each minister to nominate four. On the annual return of my birth-day, which is on the 11th July, when this doth not happen to be a Sunday, and, when it doth, let Monday be substituted, each of these sixteen persons is to receive, about noon, (at the mausoleum, unless the day should be rainy), a shilling loaf, a pound of meat, (beef or mutton), a pound of butter, a pound of cheese, and a Scotch pint of beer, with half-a-crown in money. If the minister on the trust, or any of the others whom he may appoint, should be disposed to say a few words on the subject, it may be useful."

Upon this and the subsequent parts of the case the following authorities were cited:—*Morice v. Bishop of Durham* (a), *Attorney-General v. Brown* (b), *Kendall v. Granger* (c), *Mitford v. Reynolds* (d).

The VICE-CHANCELLOR, (after reading the bequest in the will relative to the bread).—I entertain great doubt what I should have thought of this bequest, but for the direction upon the same subject contained in the testamentary paper marked B., with regard to the expression

(a) 9 Ves. 399.

(b) 1 Swanst. 265.

(c) 5 Beav. 300.

(d) 1 Phillips, 185.

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“more or less,” coupled with the fact, that the quantity of bread is not mentioned, and coupled also with the fact, that the occasional donations are not only to the twelve poor old persons, but to them and to others, (not describing those others). I am relieved, however, from a question which might have had considerable difficulty about it, by the provision contained on the same subject in the testamentary paper. [His Honor here read that part of the testamentary paper which related to the bread charity, observing, with reference to the annual gift of bread, meat &c. at the mausoleum, that the *place* of distribution was not of the essence of the gift, though to be attended to, if possible. He then said:] Upon the whole, I think, the declaration must be, that the two clauses ought to be taken together, and that the effect of the two taken together is, to direct, that, with five-fourteenths of a moiety of the testator’s clear residuary estate, provision should be made in perpetuity for the weekly gift of two sixpenny loaves to each of sixteen poor old persons, (I think that the will authorizes the insertion of the word “poor” here, although, in clause 1-8, the word is only applied to twelve old persons), to be nominated from time to time, as mentioned in the paper marked B., and also for the gift to be made on the birth-day at the mausoleum, if it should be erected, or, if not, at some other convenient place. I adopt that proportion of five-fourteenths, inasmuch as there are two gifts of £50 and one of £40, and the surplus may be nothing. I therefore declare that to be the construction of the instruments, and that, according to the law of England, such a gift is good and effectual. And I must refer it to the Master, to inquire, whether such a gift can, by the law of Scotland, be carried into effect, according to the construction I have ascribed to it, there. And if he finds that it can, then let the Master consider and report as to the best and most convenient mode of carrying it into effect; and, in doing so, let him

consider whether the testator's intention in that respect will or will not best be carried into effect by appointing trustees in Scotland to receive the fund which is to provide this annual income, and to have the charge of it, with a provision for their perpetual continuance; and, in doing so, let him have regard to the law of Scotland.

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WITH respect to the gift to the literary man (*a*), the testamentary paper contained the following directions:—

"The Literary Annuitant: This gentleman must have the votes of four, at least, of the five trustees, to render his election good. He is to have the annuity as long as he deserves it by his good conduct, but no longer. It is fair to require the votes of four at least, also, to remove him. He should preferably be at least forty years of age, but he must be a believer in Christianity. This is an indispensable qualification. As to the sect to which he may belong, that is a matter of inferior consideration; but it will be better in every point of view that he should be a Protestant, and let him be so. Perhaps it may be more desirable that he should be at least nominally a member of either of our two established churches; he should be moderate, and not a highflyer. The trustees are perfectly capable of making a due selection, and I say nothing further as to qualification. My object is to give assistance to a worthy literary person, who hath not been successful in his career, and as far as possible to enable him to assist in extending the knowledge of those doctrines in the various branches of literature to which I have turned my attention and pen, in order to ascertain what appeared to be truth, and to teach it to those who would listen. Should any of the manuscripts be published, if the gentleman chosen can

Testator, by his will, directed, that a sum *not exceeding* £50 a year should be paid in quarterly payments to a literary man, preferably not more than forty years of age. By a codicil, he declared, that his object was to give what little assistance he could to a worthy literary person who had not been very successful in his career, and, so far as possible, to enable him to assist in extending the knowledge of those doctrines in the various branches of literature to which the testator had turned his attention and pen:—*Held*, that, provided the literary works of the testator were consistent with religion and

morality, this was a charity to which the law of England would give effect.

(*a*) See ante, p. 392.

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be useful, he should preferably be employed, and receive a fair reward for his care and trouble. In those cases, any such occur, in which the subject is out of his hands, the trustees will, of course, use their discretion in employing some other literary gentleman, and reward him accordingly to circumstances. This is in the spirit of the literary part of the fund, the object of which is to afford what little assistance it will afford to deserving men who have not been very successful."

Upon this part of the case, Mr. *F. Bayley*, *amicus curiæ*, mentioned a MS. case of *Cope v. Wilmot (a)*, as

(a) R. L. 1771, A. 288. The testator, Sir John Cope, devised to trustees, (whom he also appointed his executors), and their heirs, all his freehold estates, to the use of the plaintiff for life, with remainders for the benefit of the issue of the plaintiff, in strict settlement. And he directed that his said trustees, or the survivors or survivor of them, their or his executors, should and might, out of the rents and profits of the lands thereafter directed to be purchased with the residue of his personal estate, or out of the residue of his personal estate, in case the same should not be laid out in the purchase of lands, raise, advance, and pay any sums of money they should think proper and convenient, "not exceeding" in the whole the sum of £3000, for the advancement of the plaintiff in any business, art, or profession, or in any civil or military employment. The will then contained a direction for the investment, as soon as conveniently might be, of the residue of the testator's personal property in the purchase of lands to be settled to the like uses as the

first-mentioned real estate.

After the testator's death, the trustees laid out the sum of £3000, part of the testator's personal estate, in purchasing for the plaintiff, who was then an infant, a commission in the army, and they expended the further sum of 19 6d. in purchasing for him a sword and arms and accoutrements, which they declined to advance their part of the £3000. When the plaintiff had attained his majority, he filed his bill against the trustees, claiming payment of the £3000. The defendants, in their answer, admitted as much, and were content to pay the residue of the £3000, and also admitted that they had (on certain grounds stated in their answer) declined to advance the further sum of 19 6d., residue of the said testator's personal estate, for his use and benefit. And directions were given for the payment of the £3000 to the plaintiff.

upon the expression "not exceeding," contained in the will.

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The VICE-CHANCELLOR, (after reading clause 2-8 of the will).—Supposing the words "not exceeding" out of the case, an argument might possibly have arisen upon this clause, standing alone, as to the question, whether this is or is not in the nature of what, by the English law, is considered a charity: it might have possibly been a difficult question, upon which I say nothing. I think that substantial assistance is afforded by the testamentary paper. [His Honor here read the testamentary paper as it applied to this part of the case, laying considerable stress on the last paragraph.] My opinion is, that, supposing a certain property devoted to this purpose, it is the establishment of that which the law of England considers a charity,—a public purpose falling within the definition of the expression "charitable purposes," and that the law will, accordingly, give effect to it. Understanding it to be admitted, that the testator's writings, published and unpublished, contain nothing irreligious, illegal, or immoral, I have no doubt that this is a legal disposition, according to the law of England.

Then the question turns upon the words "not exceeding;" and I confess, that, but for the case decided in 1771, I should have felt great doubt, whether, these trustees having disclaimed and declined to act, there was a gift of anything,—whether there was a certain subject here devoted to this charity. But that case having been decided, I willingly avail myself of the precedent, and, therefore, hold this bequest to be good to the extent of £50 a year, supposing neither atheism, sedition, nor any other crime or immorality to be inculcated by the works. Subject to this condition, I shall declare the bequest to be valid according to the law of England; and I shall also declare, upon the whole of the testator's testamentary instruments

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taken together, that it was his intention that this charity should be established in Scotland. And let it be referred to the Master, as in the other case, to inquire, whether, by the law of Scotland, such an institution can lawfully be established there, and to consider the best mode of carrying it into effect.

Bequest of £40 a year for the best essays in statistics, &c., with reference to the testator's writings on the subject:—

Held, valid.

Testator, after directing the income of his estate to be divided into moieties, and disposing of one moiety and making various bequests out of the other, directed that the remainder of the latter half, if any, should be given in occasional sums to deserving literary men, or to meet expenses connected with his manuscript works which he had previously directed to be printed. The trustees of the will declined to act:—*Held*, that the gift failed.

Testator first gave all his property to trustees upon certain trusts, and, secondly, directed, that the trustees, from the commencement of the fifth year from the date of his decease, should set apart annually £10 *per cent.* upon the gross income of his estate, to be invested as additional capital, in some good and valid medium of profit or interest, in order that the new income derived from that might go to increase the benefits intended by the former. He then proceeded to dispose of the remaining income:—*Held*, that no partial intestacy was created by the direction as to the £10 *per cent.*, but that the dispositions of the bulk of his property were to be treated as if it did not exist.

IN relation to clause 3-8 in the will, the testamentary paper contained the following observations:—

“ Rewards or Prizes for Essays: The universities of Scotland, my native division of our illustrious isle, are deficient in prizes for the essays of the young students in literature; her deficiency in wealth, owing to the thinness of her population, will partly, perhaps chiefly, account for this: fortunately, that cause is rapidly giving way. I trust the present example (though but on a small scale) will be followed by others. I am well aware that the young people of Scotland have done very well without such incentives to exertion; still these are useful, and, if well directed, may assist materially in dispelling prejudices and false notions or theories, and in reaching what is true. They are also calculated to give encouragement to the students, and to afford them a pleasingly anxious and interesting sort of business suited to their dispositions. I confine these prizes to Edinburgh, in the first instance, not, however, excluding the literary students of any other university or place, at home or abroad, who choose voluntarily to try their pens, or strive for the prize, because the fund at first will not admit of annual prizes to more than one univer-

ity. Should the fund increase, the prizes can be extended to the other universities of Scotland, England, and Ireland occasionally, according to circumstances."

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The VICE-CHANCELLOR, upon this and the remaining parts of the will, delivered judgment as follows:—

As to the second £50 a year, that is to be given in prize medals for essays. I have no doubt that this also is valid according to the law of England. The institution is meant to take effect in Scotland, and must have effect given it in Scotland, if the law of Scotland will allow it. The same inquiries, therefore, *mutatis mutandis*, will be made with regard to that as with regard to the rest.

The next question is as to the residue, "if any." "The remainder of the said half (if any) shall be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works." Now, if the words "deserving literary men" imported what we call here a charitable intention, and if the profits of the manuscript works were also devoted to what we call charitable purposes, perhaps there might be no difficulty; but the provision made by him respecting the produce of his manuscript works devotes a portion of them to purposes not charitable, to the benefit of members of his family; and as the gift is alternatively "to deserving literary men, or to meet expenses connected with my manuscript works," as the trustees do not act, and as it is plain they were not intended to take beneficially, I am of opinion, that this clause 4-8, the section No. 4 in page 8, wholly fails; that, whatever it is which was intended to be given under these words, it is not disposed of. Therefore, subject to £50 a year, if it can be given, to the literary man, the £40 a year for the essays, the prizes, and a provision out of the five-fourteenths for the bread charity, the residue of this moiety must, in my opinion, go as in case of an intestacy.

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Then comes the provision as to the £10 *per cent.* I have been throughout of opinion, and I remain of opinion, that that is a mere expression of a wish how property absolutely given should be employed by the person to whom it is absolutely given, which, if there be nothing more in it, is an ineffectual expression of intention. I am of opinion, therefore, that no partial intestacy is created by this direction in the will as to £10 *per cent.* upon his income, but that the direction is to be treated as simply void, and, therefore, that the dispositions as to the bulk of his property under the deduction of £10 *per cent.* are applicable to the bulk of his property without a deduction of £10 *per cent.*

The *Vice-Chancellor* then directed various inquiries as to the extent to which the testator's real property in Scotland was affected by his will, &c.

August 7th.

YOUNGHUSBAND v. GISBORNE.

Trust for the support, clothing, and maintenance of an adult—*Held* to be a trust for his benefit generally, and to devolve to his assignees under the Insolvent Act, notwithstanding a provision to the contrary in the will by which the trust was created.

FRANCIS DUCKINFIELD, by his will, dated the 17th June, 1823, gave certain real estates to trustees, upon trust to levy and raise yearly, during the life of his brother John William Astley, one annuity or yearly sum of £400; and, in case of his death in the interval between any of the days therein mentioned for payment thereof, then a proportional part thereof up to the time of death. And he directed, that the annuity and proportional part aforesaid should be held by his said trustees, upon trust for the personal support, clothing, and maintenance of his said brother, so as not to be subject or liable to the claims of any person or persons to whom he should attempt to charge,

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anticipate, or otherwise encumber the same, nor to his creditors under a commission of bankruptcy or any act for the relief of insolvent debtors, or to his own control, contracts, debts, or other engagements. And the testator declared, that the said annuity should be paid to his said brother himself from time to time, when and after the same should become due, until he should attempt to charge, anticipate, or otherwise encumber the same, or until any other person or persons might claim the same; and from and after such attempt or claim, the same should be applied by his said trustees, or some person under their direction, for or towards the personal support, clothing, and maintenance of his said brother, and for no other purpose whatsoever.

The testator died in July, 1835, and the trustees duly paid the annuity to John William Astley up to the 25th December, 1841.

On the 31st of May, 1842, John William Astley took the benefit of the Insolvent Debtors Act, and the plaintiffs, as his assignees, instituted this suit for the purpose of obtaining the annuity.

Mr. *Wigram* and Mr. *Hallett*, for the plaintiff, mentioned *Lord v. Bunn* (a).

Mr. *Beales*, for the insolvent, contended, that this was a mere personal trust for him; and, not being either an absolute interest or an interest for life, did not pass to the assignees. He cited *Twopeny v. Peyton* (b) and *Godden v. Crowhurst* (c). [The Vice-Chancellor.—If I create a trust for the maintenance and clothing of a male adult of sound mind, is it anything more than a general trust for his benefit?]

Mr. *James Parker* and Mr. *Colvile*, for the trustees.

(a) 2 Y. & C. C.C. 98.

(b) 10 Sim. 487.

(c) Id. 642.

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In the course of the argument, the *Vice-Chancellor* noticed, that, in *Twopeny v. Peyton*, the gift was to a man who, at the time of the gift, was bankrupt and insane.

The VICE-CHANCELLOR.—I wish to be understood as not giving any opinion, whether the two cases cited by Mr. *Beales* are, or are not, materially distinguishable from the present. If they are not so, then I must respectfully dissent from them. In the present case, I must say that I have no doubt. There is no clause of forfeiture, no clause of cesser, no limitation over. It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually.

Considering the language of the will and the state of the authorities, I think it reasonable that the costs should be paid out of the fund.

FORD v. RUXTON.

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July 13th.

BY an indenture of settlement, dated the 13th June, 1840, and made upon the marriage of John William Fowler, Esq., with Isabel Sarah Hooper, afterwards his wife, a sum of £8000, New 3l. 10s. *per Cent.* Bank Annuities, was vested in John Towell and John Patch, their executors, &c., upon trust to pay the dividends to the intended husband for his life, and, after his decease, to the intended wife for her life; and, after the decease of the survivor of them, upon certain trusts for the benefit of the children of the marriage, and, if there should be no child, in trust for the intended husband, his executors, administrators, and assigns, absolutely.

By the marriage settlement of A. a sum of £8000 stock was settled upon himself and his intended wife, for their joint lives, and the life of the survivor, and then for the benefit of their children; and, if no children, in trust for the settlor, his executors, administrators, and assigns. After his marriage, A. made his will, and thereby gave his real estate to P. and his heirs, upon the same trusts, as near as could be, as were declared of the stock by the settlement; and after giving certain pecuniary legacies he bequeathed all the rest of his monies and pro-

The marriage took effect; and, a few days after the marriage, namely, on the 18th June, 1840, the husband, being seised of a considerable real estate, made his will in these words:—"As my marriage has revoked the will which I had made, I hereby make another; and this is the last will and testament of me John William Fowler, of Cheltenham, in the county of Gloucester, of which I appoint John Patch, Esq., of the Temple, executor:—My farm at Chew Park, and any other lands which I may

party of any kind to P., his executors, administrators, and assigns, upon trust and for *the benefit of the objects of his settlement as he might think best.* A. died, leaving his widow, but no issue of the marriage. P. declined to take probate of the will:—*Held*, that, whether the course taken by P. had or had not the effect of depriving him of the discretionary power given to him by the will, he could not, in the events that had happened, exercise that power so as to affect the rights of the parties interested under the will and settlement; and that the effect of these instruments was to give a life interest to the widow in the real and residuary personal estate, impeachable of waste as to the real estate; with remainder as to the real estate to the testator's heirs, and as to the residuary personal estate to his next of kin.

A man settles personal estate upon himself and his wife for their lives, and then upon their children, and, in default of children, upon himself, his executors, administrators, and assigns, and afterwards directs real estates to be settled upon the same trusts, as near as can be, as affect the personalty. Upon the death of the settlor without children, the real estate, subject to the life interest of the widow, goes to his heirs.

A direction that all the testator's legacies shall be paid *clear*, means that they shall be paid clear of legacy duty.

Testator bequeathed to his servant C. a legacy of £6000. He afterwards gave to his servants who should have been living with him two years at the time of his death a year's wages:—*Held*, that C., who had been living with the testator two years at the time of his death, was entitled to a year's wages in addition to the £6000.

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possess, I give and bequeath to my friend John Patch, his heirs and assigns, upon the same trusts, as near as can be as are declared of the money in my settlement. To my wife I give £20,000 sterling. To my domestic Charles Wood I give £6000 sterling. To my servant Thomas Hopkins I give £500 sterling. To my godson, the son of my friend John Whitcomb, I give £500 sterling. To my godson, the son of my friend Patch, I give £500 sterling. To my servants who shall have been living with me ten years at the time of my death I give each a year's wage clear of anything due to them from me. To Miss Penelope Hooper I give £500 sterling. All the plate, furniture, pictures, books, linen, china, wines, carriages, horses, and other household things and property of all sorts and kinds I leave to my wife absolutely; the legacies all to be paid clear; and all the rest of my monies, securities for money and property of any kind, I leave to my friend John Patch, his executors, administrators, and assigns, upon trust and for the benefit of the objects of my settlement as he may think best."

The testator died in February, 1841, leaving no child of the marriage.

John Patch, the sole executor named in the will, having declined to take probate, the widow obtained letters of administration with the will annexed.

The bill was filed by the plaintiff, an infant, as one of the co-heirs-at-law and next of kin of the testator, against the widow, and Patch, and the other co-heirs-at-law and next of kin, and it prayed that the rights and interests of the plaintiff and the several defendants in the real and personal estate of the testator might be ascertained and declared, and for the usual administration accounts, &c.

The bill charged that the testator intended by his will to settle his real estates in the same manner, as nearly as possible, as the £8000 stock comprised in the settlement; and accordingly, that, upon the death of the testator

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without issue, his real estates vested in his co-heirs-at-law, subject only to the life interest of the widow, and to the legal estate (if any) in the defendant Patch. The bill further charged, that, according to the true intent and meaning of the settlement and will, not only the widow, but also the other next of kin of the testator, were objects of the settlement, and entitled as such to the residuary estate bequeathed to the defendant Patch, upon trust for their benefit as he might think best; and that Patch, by declining to accept probate of the testator's will, had renounced the only character in which it was competent to him to exercise the discretionary power thereby given to him, and that the execution of the trust had consequently devolved to this Court.

The defendant the widow, by her answer, submitted, that the effect of the will and settlement together was to constitute a devise of the real estate, for the benefit of herself for life, and after her decease for the *executors and administrators* of the testator, as part of his *personal estate*; and that it passed under the subsequent residuary clause, either by force of such conversion, or the words of the residuary clause itself; and that, as the discretionary power of division given to the defendant Patch by the will had ceased or become impossible, the whole of the estate of the testator passed under the residuary clause to her, the defendant, as the surviving object of the settlement.

The defendant Patch, by his answer, insisted on his discretionary right of disposing of the residuary personal estate of the testator, notwithstanding he had declined probate of the will.

After the original hearing, the widow married J. H. H. Ruxton, who was accordingly made a defendant.

The cause now came on for hearing for further directions, when the principal questions submitted to the Court were—1st. Whether the co-heirs-at-law, and the next of kin

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of the testator other than the widow, took any and interest in the real estate and residuary personal estate of the testator respectively. 2ndly. Whether the legacies given by the testator were free of legacy duty. Another point was also mentioned, viz. whether Charles W. whom the Master found to be one of the testator's servants who had been living with him two years at the time of death, was entitled to a legacy of a year's wages, in addition to his legacy of £6000.

Mr. *Wigram* and Mr. *Osborne*, for the plaintiff.

Mr. *Russell* and Mr. *Haig*, for the defendant Mrs. *Itton*, cited, upon the second point, *Gude v. Mumford* (a), *Louch v. Peters* (b), and *Barksdale v. Gilkiat* (c).

Upon the first point they contended, that, by the words "objects of my settlement," the testator must have intended some person or persons exclusive of himself. The objects clearly were his wife and children, a fluctuating class. The wife, therefore, being the sole surviving object, took the whole of the property comprised in the residuary clause: *Buffar v. Bradford* (d). Then the question was, what property was comprehended in that clause; and, on the ground stated in the defendant's answer, they submitted, that the real as well as the personal property was included in it.

Mr. *Sydenham Clarke*, for the defendant John *Palmer*, submitted to execute such settlement of the real estate as the Court should direct; but, with respect to the residuary personal estate, he contended that his client, although he had declined to prove the will, was entitled to exercise

(a) 2 Y. & C. 448.

(b) 1 M. & K. 489.

(c) 1 Swanst. 562.

(d) 2 Atk. 220.

discretionary power given to him by the testator. He referred to the passage in *Perkins* cited in *Williams on Executors*, vol. I, part 1, book 3 *ad fin.*, and to *Bray v. Bree* (a).

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Mr. *Colvile*, Mr. *Blower*, and Mr. *Crutwell* appeared for other parties.

The VICE-CHANCELLOR.—With regard to the devise of the farm at Chew Park, being real estate, the testator plainly meant nothing more than this—that the land should go in the same manner as the property comprised in the settlement which he had just before executed; but, although the ultimate limitation of the settlement was to him, his executors, administrators, and assigns, I cannot hold that he meant to change the devolution of the land. He meant that the land should go to his wife for her life, afterwards to his children, if any, in certain shares, and, subject to that disposition, to himself absolutely, according to the manner in which land is held absolutely. Therefore, as there was no issue of the marriage, the wife takes as tenant for life, subject to impeachment of waste, with a remainder or reversion to the testator's co-heirs equally. There is in the present state of the law little difference between taking equally as co-parceners and taking equally as tenants in common. The next question is, as to the ulterior provisions of the will. The testator, after giving certain pecuniary legacies, proceeds thus:—"All the rest of my monies, securities for money, and property of any kind, I leave to my friend John Patch, his executors, administrators, and assigns, upon trust and for the benefit of the objects of my settlement as he may think best." I am of opinion that the testator has here meant merely a

(a) 2 Cl. & Fin. 453; 8 Bligh, N. S., 568.

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repetition of the same idea with respect to the residuary property, as he had before expressed as to the particular real estate, and nothing more; that therefore Mr. Patch is made trustee of the residue for the widow for life, and after her death for the testator's next of kin. This is, however, said subject to the question upon the words "as he may think best." I think it unnecessary to give any opinion whether the word "property" may here be considered as including real estate of any kind, or whether the renunciation of probate by Mr. Patch has had the effect of depriving him of the discretionary power given to him by the will. I will assume that the discretionary power remains. The testator has referred to the objects of the settlement. These were the wife for her life, then the children, if any, and if none, his own representatives. The words "as he may think best" were never intended to derange the order or mode in which the wife was to enjoy the property. As the benefit intended for the wife cannot be diminished by Mr. Patch, so, on the other hand, I think that he cannot add to that benefit. The words in question were possibly meant to apply to some discretionary power as to the children. What effect they would have had if there had been children, I will not say. I am clearly of opinion that he cannot interfere with the estate of the wife, or that of the heir-at-law or next of kin.

[The decision on the other points will be seen from the minutes of the decree.]

DECLARE, that, under the will of the testator, the defendant Isabel Sarah Ruxton became and is entitled to the Chew Park Farm, and other real estate of the testator, for her life, subject to impeachment of waste, with remainder to the co-heirs of the testator equally amongst them. Declare, that the residuary personal estate of the testator is subject to a trust for the defendant Isabel Sarah Ruxton during her life, and, subject thereto, belongs to the said Isabel Sarah Ruxton and the next of kin of the said testator, according to the Statute of Distributions. Declare, that the legacies of the testator were payable free and clear of legacy duty. Declare,

that the legatee Charles Wood became entitled to the legacy bequeathed to him as a servant who had been living with the testator two years at the time of his death, in addition to the legacy of £6000 bequeathed to him by the will. • • • •

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THWAITES v. FOREMAN.

July 27th.

HENRY THWAITES, by his will, dated the 25th July, 1839, appointed Robert Foreman and John B. Stapely the trustees and executors thereof, and gave to them the sum of £750 each for their trouble in the execution of his will. And the testator, after making various specific devises and bequests, and after giving legacies to his several daughters amounting in the whole to about £23,000, legacies to his grand-children amounting to about £8000, various other considerable pecuniary legacies, (including a legacy of £1100 to his house-keeper, which he directed to be paid within six months after his decease), then a legacy of £100, and several legacies of £25 and £10 to his servants, (which he directed to be paid as soon as conveniently might be after his decease), and after devising a real estate in fee to Robert Foreman, and giving him a legacy of £350, (which he directed to be paid within twelve months after his decease or sooner), gave and devised all his other real estates, (including an estate in Sussex), and all his monies, securities for money, goods, chattels, and personal estate, not thereinbefore specifically disposed of, unto and to the use of his said trustees, their heirs, executors, administrators, and assigns, upon the trusts following; (that is to say), as to the realty, upon trust to sell and convey the same to the purchasers thereof, (in the usual form). And as to all debts and sums of money due to the testator at his decease, upon trust to collect and get in the same as soon after his decease as the same conveniently might be, or as the same debts, according to the testator's

Testator directed his trustees to stand possessed of the residue of his estate upon trust, *in the first place*, to pay what might be due under his covenant to J. S., *and then*, upon trust, set apart and invest a sufficient sum to satisfy certain annuities which he bequeathed by his will; and, *in the next place*, after making such investment as aforesaid, upon trust to pay the several pecuniary legacies bequeathed by his will. The assets were insufficient to pay all the legacies and annuities in full:—*Held*, that the annuitants had no priority over the legatees in respect of payment.

Semble, that a legatee, who asks a decree for immediate payment of his legacy, ought to pray for it by his bill.

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custom in his lifetime, might to be paid. And the testator declared and directed, that his trustees should stand and be possessed of the monies arising from the sale of his said residuary real estates, and such part of his personal estate as hereinafter directed to be sold, and also of the monies to be collected and got in as aforesaid, as the same several monies should respectively be received and got in, and also of all such parts of his residuary personal estate as should consist of ready money, upon the trusts following; (that is to say, to pay and out of the said several monies and funds, as the first piece, to pay what might be due under the testator's covenant, or otherwise, to John Shore, and the representatives of his late brother Francis Shore, deceased, and also all the testator's funeral and testamentary expenses: and then upon trust to set apart or appropriate and invest in their names or name, upon government or real securities, but the testator expressed his preference of the latter, such a sum or sums of money as should be sufficient, by the interest or dividends thereof, to answer an annuity of £100 per annum, which he the testator was bound to pay, to his brother John, since deceased, if the same should remain payable at the time of his the testator's decease, an annuity of £50 per annum, which the testator directed to be paid to his niece, the daughter of his brother John in and during the term of her natural life, and an annuity of £50, which the testator directed to be paid to Thomas Martin in and during the term of his natural life: and that such securities or monies so to be respectively appropriated or invested should, when the said annuities should respectively due, fall into his the testator's residuary personal estate hereinafter disposed of; but with full power to his said trustees, if they should think proper, instead of making such investments as aforesaid, to purchase government securities to answer the said several annuities, or either of them: and in the next place, after making such investments or purchase as aforesaid, upon trust that

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the trustees should, by and out of the said monies and securities, pay the several pecuniary legacies given by the testator's will, or which he might thereafter give by any codicil thereto, as and when the same should respectively, under the directions of the will, or such codicil, become payable. And, as to the residue of the said several trust monies and securities which should remain after answering the trusts and purposes aforesaid, including the funds and securites (if any) to be set apart for answering such annuities as aforesaid, as the same should fall in thereto as aforesaid, and the accumulations, if any, to be raised and made during the first year after his the testator's decease as thereafter mentioned, the testator did by his said will declare that the same should be in trust for the daughters living at his death of his two daughters Jane Wilcox and Charlotte Gastell, in equal shares and proportions.

The testator then declared, that the pecuniary legacies thereinbefore given to his daughters should not be paid to them, but should be held by his trustees, upon certain trusts, for their benefit and that of their issue, and for that purpose he gave directions for the investment of those legacies in real securities, and declared at great length the trusts of such securities. He then directed, that all the several pecuniary legacies thereinbefore given, except such of them as he had thereinbefore directed to be paid at an earlier period, should be paid at the end of one year after his decease; and that they should not carry interest until the expiration of that period, and that the interest on the unpaid legacies should be computed from that time, at *£4 per cent. per annum*. And he directed, that the legacies of *£750* each thereinbefore given to his trustees should be free of legacy duty. And he further directed, that, for the period of one year from the time of his decease, the dividends and interest of his residuary personal estate, and the rents and profits of his residuary real estates, or such parts thereof as might for the time being remain unsold,

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and the monies to arise from the sale of timber or underwood thereupon, or the surplus of such dividends and interest, rents, profits, and timber or wood monies, after paying or providing as thereinbefore mentioned for the said several annuities of £100, £30, and £20, and such legacies as he had thereinbefore directed to be paid before the expiration of one year after his decease, should be accumulated at compound interest, by and in the names or name of his said trustees for the purposes of his said will, which accumulations should be added to and go along with his said residuary personal estate.

The testator made a codicil to his will, the effect of which was merely to add one pecuniary legacy to those already bequeathed.

The testator died in January, 1840. The executors proved his will, and paid all his debts. They also retained their own legacies of £750 each, paid the legacies to the servants in full, and made various payments on account of the other legacies, exclusive of the annuities. These payments amounted to upwards of £6000.

The plaintiff, Elizabeth Thwaites, to whom the £30 annuity was bequeathed, received from the executors on account of her annuity three several sums of £30, £15, and £10; but after March, 1842, the executors declined making any further payment to her, on the ground, as they alleged, of an unexpected deficiency of assets.

The plaintiff therefore brought her bill against the executors, and the several persons interested under the will, praying accounts of the real and personal estate of the testator and of his debts, and that the residuary personal estate might be ascertained and might be applied in payment of the legacies and annuities, and that, if the same should be insufficient for that purpose, then that the defendants the executors might under the circumstances be deemed to have admitted assets, and might be decreed to make good the deficiency.

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The executors, by their answer, stated, that, when they retained their legacies of £750, they fully expected that the testator's assets would ultimately be sufficient for payment of all his legacies in full, but that they were disappointed in their expectations, from not being able to sell to advantage the Sussex estate, which, though a fine estate, and consisting of upwards of 1700 acres, was covered with young timber unfit for present use, and was, therefore, difficult to sell. They alleged, that they were unable to state as to their belief, or otherwise, whether the real and personal estate of the testator was insufficient to pay and satisfy his just debts, funeral and testamentary expenses, and legacies, or whether the various legatees and annuitants under the will would have to abate proportionably, though they trusted, that, if proper care were used in the sale of the remaining real estates, that would not prove to be the case. They insisted on a *moral*, if not a *legal* right to retain their legacies of £750, on the ground that those legacies were given for care and trouble, and that their doing so did not amount to an admission of assets. Upon taking a balance of receipts and payments as stated in the schedules to their answers, it appeared that they had in hand £1000.

The cause now came on for hearing.

Mr. *Russell* and Mr. *Glasse*, for the plaintiff, contended, first, that, upon the true construction of the will, the annuitants of £30 and £20, one of whom was the plaintiff, were entitled to priority over all the other legatees. Secondly, that, there being an admission of assets by the defendants, the plaintiff was entitled to an immediate decree for payment of her annuity, notwithstanding that the bill prayed that the executors might be made personally liable only in the event of a deficiency of assets after accounts taken: *Rogers v. Soutten* (a), *Woodgate v. Field* (b).

(a) 2 Keen, 598.

(b) 2 Hare, 211.

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The *Vice-Chancellor* declined to make an immediate decree for the plaintiff, and called upon the counsel for the executors to address themselves only to the first point.

Mr. *Anderdon* and Mr. *Goodeve*, for the defendants the executors.—In *Beeston v. Booth* (a), where the testator directed his executors and trustees, after payment of his debts and funeral expenses, in the next place to pay three pecuniary legacies, and afterwards to raise and set apart three other legacies, Sir *John Leach* held, that there was no priority between the two sets of legatees. So, here, the words “in the first place” &c. are merely words of enumeration, and not strong enough to shew an intention to give priority to any of the legacies. [The *Vice-Chancellor* referred to *Attorney-General v. Robins* (b).] This case is distinguishable from that, and from *Stammers v. Halliley* (c).

Mr. *Tripp* and Mr. *C. Roupell* appeared for other parties.

Mr. *Russell*, in reply.

THE VICE-CHANCELLOR.—*Primâ facie*, all bequests stand on an equal footing, and it lies upon those who assert the contrary, to prove it.

It is not sufficient that the words of the will should leave the question in doubt. They must positively and clearly establish, that it was the intention of the testator that the bequests should not stand upon an equal footing.

Now, in considering whether such was the intention of this testator, we must recollect that words that are merely introductory cannot, generally, by themselves be held to direct any order of payment; we should also bear in mind an apposite observation of Sir *John Leach*, (I think contained in *Beeston v. Booth*), that, unless the testator

(a) 4 Madd. 161.

(b) 2 P. W. 23.

(c) 12 Sim. 42.

tells you himself, that he believes his assets to be insufficient, you must attribute to him the notion that he has assets sufficient to satisfy all the bequests that he makes (a); and, if you attribute that notion to him, you cannot well infer, that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient. I was much struck with the words of this will when I first read them. I have since considered them, and looked at several of the authorities, and my impression is, that the words are not strong enough to establish the priority which has been contended for, especially when the parallel expressions in *Beeston v. Booth* are considered.

It is perhaps, also, not altogether unworthy of notice, though the observation may be slight, that the clause in the latter part of the will, in which the testator directs the accumulation of the surplus dividends, rents, and profits for one year after his decease, classes the annuities with those legacies which are payable within that time.

Upon the whole, I think, that, with respect to the question of priority, the utmost effect that can be given in favour of the plaintiff to the language of the will, on which she relies, is to say, that it creates a doubt as to the intention; but this, as I have already said, is not sufficient to change the general rule as to the order of bequests.

(a) *Sæpe de facultatibus suis, amplius quam in iis est, sperant homines.*
(Inst., lib. 1, tit. 6, sect. 3).

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July 12th,
25th, 27th, &
August 8th.

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Testator, by a will made since the stat. 1 Vict. c. 26, after directing payment of his debts and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O., and P. He

MYER SOLOMON, by his will, dated the 30th August, 1838, directed his executors, after his funeral expenses and lawful debts were paid, to distribute certain money to the poor, and after bequeathing two parchment scrolls of the (Mosaic) law written by him, together with their silver appendages, to the Synagogue in St. Alban's Place, proceeded with his will as follows:—"I do bequeath to my beloved sister Phoebe Levy all my furniture, wearing apparel, family portraits, china, silver tea and milk pot, sugar basin, twelve tea and twelve table spoons, two pair of silver salts, soup ladle, a pair of old plain silver candlesticks. I desire that my other plate, jewellery, books, pictures, remaining Hebrew scrolls not my writing, and other property not here explained, except freehold or leasehold property, to be sold, and the produce, after deducting funeral and other expenses, as expressed above, to be divided in equal

then directed that his freehold house and his leaseholds (some of which were held for years, and others for years determinable on lives) should be kept in hand and let to the best advantage, and the produce be divided every half-year to the above-named L., M., N., O., and P., or to their lawful heirs; and, in case of there being no heir, the share or shares to be divided in equal parts among the surviving legatees. The testator, at his death, left L. his heiress-at-law and sole next of kin. M., N., O., and P. were not related to L., but were related to and capable of inheriting from each other. M. died unmarried in the testator's lifetime:—*Held*, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of kin. Secondly, that M.'s share of the freehold property did not lapse, but went to the surviving devisees; the words "heir" and "lawful heirs" referring to heirs of the body, and "or" being construed "and." Thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning "other."

Testator, by a will made since the stat. 1 Vict. c. 26, bequeathed the residue of his personal estate and certain freehold and leasehold estates in equal shares to L., M., N., O., and P. In a subsequent part of his will he bequeathed to H. one-half of the legacy named to each of the other legatees; (that is to say), one-half what his brother M. ought to receive. By a codicil the testator declared as follows:—"I revoke all that part written in my former will which leaves a legacy to H., written in my will on the 32nd and 33rd lines:—"—*Held*, that, by force of this revocation, the will was to be read as if the gift to H. were not in it; consequently, that such revocation enured to the benefit of the other devisees and legatees.

If a testator, possessed of a specific chattel or chattel real, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime without issue does not enable B., though surviving the testator, to take under the will, but causes a lapse.

parts to names as hereby follow:—To my dear sister Phœbe Levy, Myer Davis, Frederick Davis, Sarah Davis, Rachel Davis, Esther Davis, children of Charles and Elizabeth Davis, Moses Moses son of Smaycha and Polly Moses, Sarah Harris, Samuel Harris, Senicha Harris, children of Henry and Elizabeth Harris; but to the minors above named, their shares to be to interest until they become of age; or should they marry before that period one of our holy religion, it shall then be in the power of my executors to pay them their share as above described. The freehold house situate in Little Queen Street, Westminster, as also my leaseholds, under the crown or otherwise, to be kept in hand, and be let to the best advantage, and the produce to be divided every half-year to the above-named Phœbe Levy, Myer Davis, Frederick Davis, Sarah Davis, Rachel Davis, Esther Davis, Moses Moses, Sarah Harris, Samuel Harris, Senicha Harris, or to their lawful heirs, and in case there being no heir, then the share or shares to be divided in equal parts amongst the surviving legatees. And I do hope that my legatees and their heirs will not depart from and quit our holy faith as becomes a good Jew, so long as he, she, or they shall be fully entitled to this my bequest; but if any of the above-named or their heirs shall be proved satisfactorily to the executors or trustees for the time being as having departed from our holy Mosaical religion, in that case it shall be the duty of the executors or trustees for the time being to withhold his, her, or their shares or dividends, and pay the same in equal parts to the others as named above remaining and continuing in holy faith. I do also bequeath unto Henry Moses, at present in America, one-half of the legacy named to each of the other legatees, (that is to say), one-half of what his brother Moses Moses may receive.” The testator then appointed Charles Davis and others to be his executors.

The testator made a codicil to his will, dated the 4th

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July, 1840, which was partly in these words: "In this codicil I revoke all that part written in my former will dated 9th Elul, 5598, answering to the English month 30th August, which leaves a legacy to Henry Moses, now in America, written in my will on the 32nd and 33rd lines. I also bequeath unto my good friend Charles Davis, for his great attention to me, £50, &c. Done this 4th day of July, answering to the 12th day of Thamuz, in the year 5600 of the Hebrews."

Moses Moses, one of the legatees named in the will, died, a bachelor, in the lifetime of the testator, that is to say, on the 16th November, 1840.

The testator died on the 30th December, 1840, leaving Phoebe Levy, his sister and heiress-at-law, and also his sole next of kin.

The bill was filed by the children of Henry and Elizabeth Harris, against the executors, and against Phoebe Levy and the children of Charles and Elizabeth Davis; and it prayed that the trusts of the will might be carried into execution.

The cause now came on for hearing, for further directions. It appeared from the Master's report that the leasehold estate consisted of two messuages and land in Pall Mall, held for a term of ninety-nine years from July, 1827, and a leasehold house and garden in Kennington, held for a term of ninety-nine years from January, 1843, determinable on the life of Prince George of Cambridge. The Master found that none of the legatees had departed from the religion described by the testator as the holy Mosaic religion.

It was stated at the bar, and not contradicted, that Elizabeth Davis, Polly Moses, and Elizabeth Harris were sisters of the testator's wife.

The questions discussed were, what, in the events that had happened, had become of Moses Moses's share, first, in

the residuary personal estate; secondly, in the freehold estate; thirdly, in the leaseholds (a); and, also what effect the revocation of the legacy to Henry Moses by the codicil had upon the interests of the other legatees.

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Mr. *Chandless* and Mr. *Hore*, for the plaintiffs, and Mr. *Wigram*, Mr. *James*, and Mr. *Drewry*, for defendants in the same interest, said that they would not press the question as to Moses Moses' share of the residuary personal estate, which probably the Court would consider to have lapsed for the benefit of the next of kin. But they submitted that his share of the freehold (the whole fee-simple in which was well devised by means of the devise of the rents) devolved upon his death, either to his heirs (living at his death) by substitution, or in default of such heirs to the surviving devisees of the freehold: stat. 1 *Vict.* c. 26, s. 24, *Gittings v. M'Dermott* (b), *Loveday v. Hopkins* (c), *Steward v. Garnett* (d); and that his interest in the leaseholds for years also went to the same devisees, inasmuch as the testator could not from the words, "in case there being no heir," taken in connexion with the context, be held to have intended an indefinite failure of issue; and if he could not, then the stat. 1 *Vict.* c. 26. s. 26, would come in aid. As to the gift to Henry Moses, the effect of the codicil was to strike it out of the will, so as to place the will in the same situation as if it had never been inserted in it.

Mr. *Anderdon* and Mr. *Evans*, for the defendant Phœbe Levy.—With respect to the freehold estate, if it appear to have been the intention of the testator to tie up the enjoyment of the property, by means of successive life estates, the Court cannot hold that an estate larger than a life es-

(a) The question as to the leaseholds held for years determinable on lives was compromised.

(b) 2 M. & K. 69.

(c) Ambl. 273.

(d) 3 Sim. 398.

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tate has been given: *Seaward v. Willock* (a); and the he will take what is not given. As to the leaseholds for years the interest of Moses Moses in them has lapsed, and goes to the testator's next of kin. The testator, after making certain specific gifts, desires that all his "other property except freehold and leasehold," shall be sold and the produce divided among certain persons. He afterwards devises the freehold and leasehold to the same persons. The only reason that he excepts the freehold and leasehold from the former part of the devise is, that it may not be sold. But he comprehends all within the term "other property," and therefore treats the whole as residue. But if the legatee of a portion of the residue dies in the testator's lifetime, his share does not fall into the remaining part of the residue, but is considered as undisposed of, and goes to the next of kin: *Skrymsher v. Northcote* (b), *Lloyd v. Lloyd* (c), *Attorney-General v. Johnstone* (d), (supported by Lord Eldon, in *Legge v. Asgill* (e)), *Ray v. Adams* (f).

Upon the second point, the share of Henry Moses, both in the realty and personalty, does not in the events that happened devolve to the residuary devisees and legatees, but is undisposed of: *Baker v. Hall* (g), *Creswell v. Cheslyn* (h), *Mortimer v. West* (i). The case of *Creswell v. Cheslyn* decides that the revocation of a bequest of part of the residue is the same in effect, as regards the other residuary legatees, as the lapse of that part.

The *Vice-Chancellor* observed, that the language of the codicil as to the revocation of the legacy to Henry Moses, seemed to amount to a direction by the testator that his will should be read as if all that related to that

(a) 5 East, 198; 1 Smith, 390.

(b) 1 Swanst. 566.

(c) 4 Beav. 231.

(d) Ambl. 577.

(e) T. & R. 268.

(f) 3 Myl. & K. 237.

(g) 12 Ves. 497.

(h) 2 Eden. 123.

(i) 2 Sim. 274.

legacy were struck out with a pen: and his Honor asked Mr. *Simpkinson*, if he was aware of an authority upon that species of revocation.

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Mr. *Simpkinson*, *amicus curiæ*, mentioned *Utterson v. Utterson* (a).

The *Vice-Chancellor*, also, in the course of the argument, asked whether there was any case in which the word "heirs" had been considered to mean "heirs of the body" merely on the ground of the consanguinity of the persons to whom reference was made, where some of the individuals of the class in which such persons were included were not capable of being heirs to the others.

No case was cited in answer to this inquiry; but it was contended on the part of the plaintiffs that the words "heir" and "lawful heirs" must receive that signification here, for that in this case one individual only of the whole class was a stranger, and the limitation over in default of an heir, was to the surviving legatees, in the plural number, one of whom at least must be capable of inheriting from the other members of the class.

In reply to that part of the argument of Phoebe Levy's counsel, which related to the bequest of the leaseholds for years, the cases of *Roberts v. Cooke* (b), *Mitford v. Reynolds* (c), and *Clowes v. Clowes* (d), were cited. [The *Vice-Chancellor* referred to the observations of Sir *William Grant*, in *Leake v. Robinson* (e).]

(a) 3 Ves. & B. 122; see, also, 8 B. & P. 16.

p. 454. *Sed quære.*

(b) 16 Ves. 451. Mr. *Hovenden* thinks that there is some error in the last line of the report of this case. See *Hov. Supp.* Vol. 2,

(c) *Phillips*, 185. See *Knight v. Gould*, 2 M. & K. 295.

(d) 9 Sim. 403.

(e) 2 Mer. 392.

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The *Vice-Chancellor* stated his opinion to be that the share of Moses Moses in the residuary personal estate had lapsed. He likewise intimated an opinion that the share of the same legatee in the chattel leaseholds had lapsed unless saved by the doctrine contained in *Forth v. Chapman* (a), united with the 29th section of the Will Act; but that his share in the freehold estate had not lapsed. Judgment, however, was reserved upon the last two points, and also upon the question of the revocation of the legacy to Henry Moses.

August 8th.

The VICE-CHANCELLOR.—The questions in this case are questions of construction upon the will and codicil made respectively in August, 1838, and July, 1840, of Myer Solomon, which, so far as it is material to state them, are thus:—[His Honor here read the material parts of the will and codicil, and, after stating that Moses Moses died in the testator's lifetime, without leaving issue, and observing, that the case of *Seaward v. Willock*, which had been cited in argument, seemed to have no application to the present case, proceeded thus:—]

I have already expressed my opinion that the share of the testator's residuary personal estate, which Moses Moses would have taken, had he survived the testator, has lapsed. I think that the testator cannot be considered to have intended to affect it by the clause beginning "And in case there being no heir."

With regard to the freehold house, I am of opinion that the share of Moses Moses has not lapsed, and that the whole of the freehold house belongs to the other nine devisees of it equally in tail, subject to the question as to Henry Moses, which I shall mention. It is admitted, that eight of them are related to each other, and capable of inheriting from each other, and were related to Moses Moses,

(a) 1 P. W. 663.

and capable of inheriting from him; and, though it is said, and I suppose accurately, that the testator's sister Phœbe Levy was not related to Moses Moses, and is not related to either of the persons who with her are the surviving devisees, I am, from the relationship between the eight and Moses Moses, of opinion, upon the authority of *Webb v. Hearing* (a), *Tyte v. Willis* (b), *Morgan v. Griffiths* (c), and various other decisions, as well as the reason of the thing, that the word "heir," in the clause beginning "and in case there being no heir," must be taken as meant in the sense of "heir of the body," or "issue," and as shewing that by the words "their lawful heirs," in the passage "or to their lawful heirs," the testator meant "the heirs of their bodies,"—a construction not, I think, prevented by the undoubted authority of *Tilbury v. Barbut* (d), and other cases of the same class,—nor can the word "or" in this passage be construed otherwise than as "and"—for which *Wright v. Wright* (e), *Read v. Snell* (f), and numerous other decisions form amply sufficient authority. The clause therefore beginning "and in case there being no heir" has the effect of carrying Moses Moses' share of the freehold house, as I have said, to the other nine devisees in tail.

With regard to the leasehold property, which I understand to be chattel leasehold, for a term or terms exceeding twenty-one years, and not determinable on lives, I have had some doubt whether it might not be possible by means of the word "surviving," or from the joint operation of the late Will Act and the doctrine of *Forth v. Chapman*, to hold that Moses Moses' share of it belongs also to the other nine devisees. But, upon consideration, I think that such a construction of this will cannot be maintained, and that his share of the leasehold has lapsed. It seems to me

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(a) Cro. Jac. 415.

(b) Ca. t. Talb. 1.

(c) Cowp. 234.

(d) 3 Atk. 617.

(e) 1 Vez. sen. 409.

(f) 2 Atk. 645.

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that the words "there being no heir" must be held to point to an indefinite failure of issue, and that this is one of the cases in which the word "surviving" must be read "other."

In alluding, as I just now did, to the Will Act, I meant to refer particularly to the 29th section. But there is another section, the 24th, upon which I doubted for some time, whether the lapse of Moses Moses' share of the leasehold might not be held to be obviated. I think, however, that, unless there is authority for so interpreting the 24th section, (and none has been mentioned), I cannot venture to do so. I may observe that the republication of the will, by the codicil, has not been argued in the present case to affect the question of lapse as to Moses Moses' share of the leaseholds.

Upon this part of the cause, among the authorities into which I have looked, besides *Nicholls v. Skinner* (a), *Keily v. Fowler* (b), *Wilmot v. Wilmot* (c), *Barlow v. Salter* (d), *Massey v. Hudson* (e), and *Candy v. Campbell* (f), has been a case of *Mackinnon v. Peach* in 2 *Keen* (g). With reference to that case, I may, perhaps, be allowed to say, that I have always thought, that if a testator possessed of a specific personal chattel, such as plate, or a chattel real, liable to the same considerations, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime, without issue, does not enable B., though surviving the testator, to take under the will, but causes a lapse; nor am I the only Judge of the Court of Chancery by whom that opinion is entertained. If *Mackinnon v. Peach* is to be understood as shewing the *Master of the Rolls* not to be of that opinion, I must with great deference respectfully differ

(a) Pre. Ch. 528.

(b) 3 Bro. P. C. 299, ed. Toml.

See *Garratt v. Cockerell*, 1 Y. & C. C. C. 494.

(c) 8 Ves. 10.

(d) 17 Ves. 479.

(e) 2 Mer. 130.

(f) 8 Bligh., N. S., 469.

(g) 2 Keen, 555.

Lordship. I apprehend that the bequest which I supposed excludes the notion that the testator B. or his representatives to take only if A. died leaving issue, or to take only if neither A. nor A. should be living at the testator's death, and the notion, that anything but an interest in the to commence after the failure of A.'s issue, when-appearing, was meant to be given to B., or his relatives. The whole bequest supposed is, in truth, a gift to A. absolutely, a gift therefore wholly as it seems to me, by A.'s death without issue in ator's lifetime, or by A.'s death in the testator's

It surely could not be contended, that, in the the testator surviving A. and then dying survived of A., it would be possible for B. to claim. I do that the absence of issue makes any difference. to B. in the will being, as expressed, merely illegal re nullity, cannot, I suppose, be made better by the of A.'s death without issue before the testator (a). *Howes v. Howes* (b), *Willing v. Baine* (c), and cases of id, seem to me (I speak with very great deference *Langdale* if he is of a different opinion) not to affect stion. I observe that the point and grounds of the as to the plate in *Mackinnon v. Peach* are viewed y by two gentlemen of learning and research in

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the *Vice-Chancellor's* there is, at this place, a to the Institutes, lib. 2, . 32. The section is in is :—" *An servo hæredis nus, quæritur : et constat, liter legari, nec quicquam si, vivo testatore, de po-redis exierit : quia, quod et legatum, si statim post tamentum decessisset tes- : non debet ideo valere, ius testator vixerit. Sub*

conditione vero rectè legatur servo, ut requiramus, an, quo tempore dies legati cedit, in potestate hæredis non sit."

The note-book also contains an extract from a note of *Vinnius* on the last passage, in these words :—" *Quia, quod legatum in incertum eventum suspenditur, id dici non potest tempore testamenti valere aut non valere."*

(b) 1 Russ. & M. 639.

(c) 3 P. W. 113.

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two recent works that seem to me to possess very considerable ability and merit; I mean Mr. *Lewis's Treatise on the Law of Perpetuity* and Mr. *Smith's Original View of executory Interests* annexed to his edition of *Fearne*. My impression is (I only state it as an impression) that the point of the decision was that supposed by Mr. *Lewis*, and it is, therefore, that, from the great respect due to the judgments of the *Master of the Rolls*, I have said so much on this part of the case.

The only remaining question is, I believe, as to the effect of the codicil upon what the will had given to Henry Moses. I think that it revokes the entire gift to Henry Moses whether consisting of realty or personalty or both; but does that revocation operate for the benefit of Phœbe Levy, who is the heiress-at-law and next of kin, or for the benefit of herself and others? This point has appeared to me to be one of some difficulty. The case of *Creswell v. Cheslyn* clearly binds the Court; and, if the present case is not substantially distinguishable from it, is decisive. But I am of opinion, that it is distinguishable. There the will, giving the residue to two sons and a daughter of the testator equally, did not anywhere profess to give any possible interest in the daughter's share to either of the sons. The codicil revoking the gift to her, having been held by the *Lord Chancellor* and the *House of Lords* not to contain any expression of intention in favour of the sons or any person as to the share so withdrawn from her, it was impossible consistently with that view to say, that the sons could take what was never given to them. To have read his will as if the gift to her had been struck out of it, would not have had the effect for which the sons contended, without farther altering its language. In the present case, property composed of freehold and leasehold and of the residuary personal estate was given by the will wholly to ten persons equally: but, by a subsequent clause in the same instrument, a distinct clause, an unequal share

in the same property was given to an eleventh person, Henry Moses. A codicil revoked that gift to him. The will is so constructed as that, read with the total omission of the revoked gift, it gives the property entirely to the ten other persons, without farther altering or departing from its language. The provision for Henry Moses, being considered as struck out of the will, every thing is, on the face of the will, manifestly disposed of. This kind of question must, in each instance, not concluded by authority, be a question of intention upon the particular instrument to be construed. In a case substantially the same as *Creswell v. Cheslyn*, I should be bound to hold, and probably, if not bound, should from my own judgment hold, that there was a lapse. But I repeat that I do not view this case as substantially identical with *Creswell v. Cheslyn*, or, of necessity, to be governed by that decision. When the testator says by the codicil, "In this codicil, I revoke all that part written in my former will, dated 30th August, which leaves a legacy to Henry Moses, now in America, written in my will on the 32nd and 33rd lines," he appears to me to direct in terms sufficiently plain, that his will shall take effect, as if the clause in favour of Henry Moses had not been inserted in it. I have no doubt of his intention, which may, I think, be judicially upheld, consistently with the authority, high in every respect, and as I have said absolutely binding on the Court, to which I have referred.

Mr. *Wigram* said that this case might be reasonably argued to stand on a footing not materially different from that of a complete gift by a will, the gift partially revoked by a first codicil, and the first codicil itself wholly revoked by a second codicil, which would leave the gift as it stood upon the will. That is very much the view that I also take of it. My opinion, I repeat, is, that, in the present case by reason of the codicil, the will is to be read as if the gift to Henry Moses were not in it; and that, consequently, subject only to the partial cause lapsed by the death of Moses Moses, the other nine original devisees and

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legatees take as such without any diminution by reason of the gift to Henry Moses.

DECLARE, that the share of the general personal estate intended for Moses Moses lapsed for the benefit of the next of kin of the testator. Declare, that the share of the freehold house intended for Moses Moses did not lapse, but passed to the other devisees of the same as tenants in common in tail. And, the defendant Phœbe Levy consenting, declare, that the share intended for Moses Moses of the testator's leasehold house, held for a term of years determinable on the life of Prince George, did not lapse, but passed under the will of the testator to the other legatees of the testator's leasehold estates as tenants in common. Declare, that the share intended for Moses Moses of the testator's other leasehold estates lapsed; and that the share which so lapsed fell into the residue of the testator's personal estate, and passed under the general bequest of the same, contained in the will. Declare, that the revocation which the testator, by his codicil, made of that part of his will which leaves a legacy to Henry Moses, enured to the benefit of the other devisees and legatees of the testator. * * * * *

August 8th.

EVANS v. COCKERAM.

Upon the construction of a will—*Held*, that a particular freehold estate of the testator was the primary fund for the payment of a mortgage debt which had been charged thereon by the testator in his lifetime, in exoneration of the personality and other estates.

WILLIAM TAYLOR THOMAS, by his will, dated 11th May, 1824, gave, devised, and bequeathed unto his son William Taylor Thomas all his estate on which he then lived, called Fluxton, with all rights, members, and appurtenances thereunto belonging, to the only use and behoof of his said son William Taylor Thomas, his heirs and assigns, for ever; but he declared, that that bequest should not take any effect either of the income or otherwise, until he should attain the age of twenty-three, subject in the mean time to the following reservation, namely, "I hereby give and bequeath the same estate, called Fluxton, with the appurtenants thereto belonging, unto my dear wife Mary Lathy Thomas, during my said son's minority, for the support of herself, and also for the support and education of all my children, in such proportions and manner as in her discretion she shall think proper, with this injunction—that the dwelling-house and premises

shall be kept in good and tenantable repair during the term of his said minority. Also I hereby authorize and empower my said wife to raise the sum of £200, for each of my daughters, as they shall respectively attain the age of twenty-one years, by way of mortgage or otherwise on security of my said estate, called Fluxton; and I hereby charge and make liable my said estate, for the re-payment of the said sums of £200 to each of my said daughters, as aforesaid, and also for the payment of any sum or sums of money on the security of my said estate, at my death. Also I give and bequeath to my dear wife all my other property, of what nature, sort, or kind it might consist, leaving to her discretion and management the education of each and every one of them." And from and immediately after the death of his said wife, the testator gave and bequeathed all his personal and freehold property, not thereinbefore given, unto all his children, (his elder son William Taylor Thomas excepted), in even and equal shares and proportions between them, and he appointed his wife Mary Lathy Thomas his sole executrix, and Samuel Evans and John Denning jun. trustees of his said will, to act in conjunction and as assistants to his wife, or in case of her death.

The testator at the date of his will, and at the time of his death, was seised of the freehold estate, called Fluxton, which was subject to a mortgage for £1150, for a debt which he had incurred. He was also absolutely entitled to a messuage and meadow, called Holmer, which was unincumbered, and of which one undivided moiety was freehold and the remaining part leasehold.

The testator's widow having died, the present bill was filed on behalf of the testator's daughters for the purpose of having the residuary accounts taken, and incidentally for the purpose of obtaining the opinion of the Court, whether or not the mortgage-debt was charged by the will on the Fluxton estate, in exoneration of the personal and other estates of the testator.

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There being a fund in Court arising from the testator's residuary real and personal estate, the question of exoneration now came on for argument, upon the petition of the daughters for the payment to them of that fund.

It appeared from the Master's report that the daughters would all arrive at the age of twenty-one before the son attained twenty-three.

Mr. *James Parker* and Mr. *Neate* for the petitioners.—The words of this will are not merely words of recognition, but of charge; they amount to a positive charge, not of all the testator's debts, but of a particular debt, upon this particular estate. The other estates of the testator are therefore exonerated, without express words for that purpose, upon the plain intention of the testator: *Hancox v. Abbey* (a), *Welby v. Rockliffe* (b), *Dawes v. Scott* (c), *Bickham v. Crutwell* (d), *Bootle v. Blundell* (e). The case of *Noel v. Lord Henley* (f), which differs in principle from these, was carried to the *House of Lords* and disposed of on different grounds.

Mr. *Bacon* for William Taylor Thomas.—The testator gives the estate to his son at twenty-three, "subject in the mean time to the following reservation," which is, that he gives the estate to his wife for certain purposes, till his son attains twenty-three. The restriction is only to be in force during the minority of the son, and as the daughters would all attain twenty-one during that minority, there is no ground to contend that any charge existed upon the estate, beyond that time. The words "in the mean time" refer to mortgages as well as anything else. Then is there anything in this will to discharge the personal estate? It is not contended, that there are words for that purpose; and upon the whole it is submitted that the inference as to

(a) 11 Ves. 179.

(b) 1 Russ. & M. 571.

(c) 5 Russ. 32.

(d) 3 Myl. & Cr. 763.

(e) 19 Ves. 517; 1 Mer. 193.

(f) 7 Price, 240; Dan. 212.

the testator's intention is the other way. *Watson v. Brickwood* (a), *Bootle v. Blundell*.

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The VICE-CHANCELLOR.—This testator being seised in fee of two real estates, one mortgaged for his own debt, but not otherwise encumbered, the other not at all, makes his will which amongst other things contains this declaration—“And I hereby charge and make liable my said estate,” (that is to say), his mortgaged estate, “for the re-payment of the said sums of £200 to each of my said daughters as aforesaid,” meaning those sums which he had authorized and empowered his wife to raise for each of his daughters, on their respectively attaining the age of twenty-one, and then he goes on; “and also for the payment of any sum or sums of money on the security of my said estate, at my death.” That is part, in every sense of the word “sentence,” of the same sentence, which contains the provision for the £200, which was charged upon this estate only. The words understood in the latter part of the sentence after the words “and also” are “I hereby charge and make liable my said estate.” Now, in favour of the creditor he could not charge this estate, or make it more liable than before. But I think it not a mere recognition of liability; it is more than that; it is an active charge. I think that the testator intended this estate to bear the debt in priority to the other estates. But there are so many cases on the subject that I will keep this will for a few days, and, if I should change my opinion, I will deliver my reasons in writing; if I should not, it must be taken that my opinion remains that the mortgaged estate is primarily charged.

The case was not mentioned again.

(a) 9 Ves. 447.

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August 8th.

BORDINAVE v. WADESON.

The Court refused to entertain a special motion to dissolve the common injunction.

THE bill was filed by the indorser of a promissory note, to restrain an action brought on the note, and to have the note delivered up. The action had been brought in the beginning of June, notice of trial was for the 23rd July, the bill was filed on the 23rd July, and the common injunction, for want of answer, had been obtained on the 1st August. The answer having been since filed,

Mr. *Hallett*, now moved, specially, to dissolve the injunction; citing *Sharpley v. Perring* (a). He also referred to *Drewry on Injunctions* (b).

The *Vice-Chancellor* referred to *Montague v. Hill* (c), and, after observing that *Sharpley v. Perring* was *ex relatione*, called upon the counsel on the other side to address himself only to the question of costs.

Mr. *R. W. E. Forster*, *contrà*, observed, that, as the approaching Vacation would be no obstacle to the dissolution of the injunction, *Lane v. Barton* (d), the motion ought not to have been made. He also cited *Thorpe v. Hughes* (e).

THE VICE-CHANCELLOR.—As this is a bill substantially for discovery, and as there is that *ex relatione* report in *Simons*, I will reserve the costs; but the motion must be refused. Mr. *Hallett*, however, is at liberty to take an order *nisi* to dissolve the common injunction.

(a) 8 Sim. 600.

(b) P. 411.

(c) 4 Russ. 128.

(d) Phillips, 363.

(e) 3 Myl. & Cr. 742.

MEMORANDA.

IN Trinity Vacation, 1844, *F. J. Holt*, Esq., Vice-Chancellor of the Duchy of Lancaster, died, and was succeeded in his office by *Horace Twiss*, Esq., one of her Majesty's counsel.

In the same Vacation, *John Hodgson*, Esq., of Lincoln's-Inn, *Charles Howard Whitehurst*, Esq., of the Middle Temple, *William John Alexander*, Esq., of Lincoln's-Inn, *Robert Charles Hildyard*, Esq., of Lincoln's-Inn, and *James Parker*, Esq., of Lincoln's-Inn, were appointed her Majesty's counsel; and *Edward Bellasis*, Esq., of the Inner Temple, *James Alexander Kinglake*, Esq., of Lincoln's-Inn, and *Charles Chadwicke Jones*, Esq., of the Middle Temple, were called to the degree of the Coif, and gave rings with the motto "*Paribus Legibus.*"

Early in Michaelmas Term, 1844, the Right Hon. *Thomas Erskine*, one of the justices of the Court of Common Pleas, resigned his office, and was succeeded by *William Erle*, Esq., of the Middle Temple, who had previously been called to the degree of the Coif (giving rings with the motto, "*Tenax Justitiæ*"), and who, shortly after his appointment, received the honour of knighthood.

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Nov. 4th.

TILLY v. SMITH.

Upon the construction of a will—*Held*, that it was the intention of the testator, in the event of his wife and any of his children living at his death surviving him, that there should, at some time or other, be an absolute sale and conversion of his real estate for their benefit.

Held, also, the wife and one of the daughters having survived the testator, that the daughter did not take, by devise or descent from him, any real estate descendible to her heir-at-law.

JOSEPH DUNN, being seised and possessed of real and personal estate, made his will dated the 25th August, 1811, which was partly in these terms:—"I give unto James Saunders of Frenchay, in the county of Gloucester, and John Dunn, of Upper Eason, in the said county, in trust for the purposes herein mentioned, (that is to say), that, when it shall please Divine Providence to remove me from works of rewards, they shall take to and possess themselves of all my premises of Lower Eason and elsewhere, with all monies, household furniture, and stock I may be possessed of at my decease, for the purposes hereinafter mentioned, (that is to say), that, as soon as convenient after my decease, they shall pay all my just debts and expenses. 2. It is my will, my said trusts shall permit and suffer my wife to hold one of my houses, with the garden, for her use to bring up our children, viz. Elizabeth and Mary, and at their arriving to the age of twenty-one years, then it is my will, all my estates real and personal to be sold and converted into money, and the proceeds to be equally divided between my said wife and as many children as she may have at my decease. 3. It is my will that the public-house be let as soon after my decease as possible, and all rents arising from my estates, to be paid to my wife, for the bringing up and support of my wife and children, and her receipts shall be a sufficient discharge to my said trusts. And, lastly, I revoke all wills hereinbefore made, and declare this my last will and testament."

The testator at his decease had no other children than those named in his will (a).

(a) It was not alleged in the will, that the testator's wife had no children by any former husband, at the time of the testator's decease.

The testator's daughter Elizabeth died in his lifetime, under the age of twenty-one and unmarried.

The testator died in October, 1811, leaving his widow and his daughter Mary surviving him, his daughter being his heiress-at-law. The widow obtained letters of administration, with the will annexed, of the testator's personal estate, and entered into possession and receipt of the rents and profits of his real estate.

The widow afterwards married Thomas Smith.

In September, 1824, which was after the widow's second marriage, the testator's daughter Mary Dunn died under the age of twenty-one, intestate, and unmarried, whereupon letters of administration of her personal estate were granted to her mother Mary Smith.

Mary Smith died in November, 1842; whereupon her husband Thomas Smith obtained letters of administration of her personal estate, and letters of administration *de bonis* ~~non~~ of the personal estate of Mary Dunn.

The bill was filed by William Tily and Elizabeth his wife, the latter claiming as the sister and heiress-at-law of the testator, against Thomas Smith, and James Saunders, who was the heir-at-law of the surviving trustee under the will. After alleging that the testator's debts had been long since paid, and that no part of the real estate devised by the will of the testator had been sold or disposed of, and that the defendant Smith had since his wife's death been in possession and receipt of the rents and profits, the bill charged, that the time at which the testator by his will had directed the sale and conversion of his real and personal estate to take place, had not arrived, and that, in the events which had happened, such time could not ever arrive, and that the real estate was not, according to the true construction of the will, absolutely converted into money, and that in the events which had happened, the same was undisposed of, and upon the death of the testator

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resulted to his daughter Mary Dunn, as his heiress-at-law, and upon her death became vested in the plaintiff.

The bill prayed declarations in accordance with these charges, and for a conveyance and delivery up of possession of the real estates devised by the will, together with the title-deeds relating thereto, to the plaintiffs; and for a receiver.

To this bill the defendant Smith demurred for want of equity.

Mr. *Schomberg* for the demurrer.—The defendant is clearly entitled to one moiety of the property. It is submitted, however, that he is entitled to the whole. The infant Mary Dunn took a vested interest in the proceeds of the estate, although she died under twenty-one. At the testator's death, there was in contemplation of equity an absolute conversion of the property, unless it should be held, that by reason of one only of the infants surviving the testator, and consequently there being an impossibility that both should attain twenty-one, the object of the testator failed altogether. The Court, however, will not put that construction on the words "at their arriving at the age of twenty-one years." [The *Vice-Chancellor* referred to the observations of Sir *W. Grant*, in *Murray v. Jones* (a).] Then assuming that the surviving daughter was an object of the testator's bounty, she took a vested interest in the proceeds. The direction for a sale fixes the time of enjoyment only, and not the time of vesting: *Boraston's case* (b), *Manfield v. Dugard* (c), *Bromfield v. Crowder* (d), *Warter v. Hutchinson* (e). Upon the death of the daughter, therefore, her moiety went to her mother

(a) 2 Ves. & B. 313; see p. 322.

(b) 3 Rep. 19.

(c) 1 Eq. Ca. Abr. 195.

(d) 1 N. R. 313.

(e) 1 Barn. & Cr. 721.

administratrix. But even supposing there was an intestacy, as to that moiety, and that it resulted to the daughter, as the testator's heir-at-law; yet, as conversion would be necessary, there would be a partial failure only of the testator's purpose, and the share would accordingly result to the heir as personalty, and would upon her death devolve to her mother as administratrix: *Wright v. Wright* (a), *Smith v. Claxton* (b). [The Vice-Chancellor inquired whether the daughter took any and what interest in the rents and profits of the estate previous to a sale; referring to *Gibson v. Lord Montfort* (c), and the observations of Lord Eldon, in *Genery v. Fitzgerald* (d).]

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Mr. Wigram and Mr. Rasch, for the bill.—The effect of the will was to give an estate to the wife for her life, or till some child of the testator and his wife should attain twenty-one, and then there is a contingent gift to the wife and children equally. Whether the intermediate rents are vested or contingent, the direction for conversion is contingent. It is clear, however, from the clause marked three, that the testator intended that his wife should take the whole of the rents, during her life. Except the rents of the estate, there is nothing given to the wife or children, save in the direction to divide. What is to be divided? The proceeds of the sale. In what event? "At their arriving to the age of twenty-one years." These are words of contingency, and admitting, that, in connexion with the context, they may be applied to one child only, yet they cannot be so construed as to enable the Court to hold, that a vested estate was given: *Shuldham v. Smith* (e). If the testator intended (as seems to have been the case) that the vesting of the shares should be contemporaneous with and

(a) 16 Ves. 188.

(b) 4 Madd. 484.

(c) 1 Vez. sen. 485.

(d) Jac. 470.

(e) 6 Dow. 22.

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dependant on the sale, the children's shares did not vest *Elwin v. Elwin* (a), *Polley v. Seymour* (b).

But, supposing this view of the case to be inaccurate and that it is a right conclusion that vested interests were taken by the mother and daughter, if they took vested interests, it must be upon grounds independently of the direction to convert. They can have no vested interest in proceeds depending on the mere accident of sale. Their interest must be of a real nature, and what belongs to the daughter must in such case devolve to her heir. It cannot be said, that the daughter was to take the property, and yet that the gift was not contingent. If the gift was not contingent, she must of necessity have taken it as land.

It is assuming the whole question to say that conversion is necessary, in order to give the widow her moiety. And if conversion is not necessary, the property for the purposes of devolution remains in *statu quo*: *Walker v. Denne* (c), *Jessopp v. Watson* (d), *Cogan v. Stephens* (e), *Hereford v. Ravenhill* (f), *Bunnett v. Forster* (g).

Mr. Schomberg, in reply.

The VICE-CHANCELLOR—The question in this case is upon the construction of the will of Joseph Dunn, who, when he made it, had a wife and two children, named Elizabeth and Mary. He does not appear to have had then or afterwards any other issue. One of the daughters died in his lifetime a minor, without having been married. The other daughter survived him, but also died a minor without having married. She was survived by her mother, the testator's widow, who also is now dead. The testator's surviving daughter was his sole heiress-at-law. Her heiress

(a) 8 Ves. 547.

(b) 2 Y. & C. 708.

(c) 2 Ves. jun. 170.

(d) 1 M. & K. 665.

(e) 1 Beav. 482, n.

(f) 5 Beav. 51.

(g) 8 Jur. 415.

is the plaintiff Mrs. Tily, in whose right the bill is filed, and who is also now the testator's heiress-at-law.

It is in this state of things that the will is to be construed; the question being whether Mrs Tily, as the heiress of the testator or of his surviving daughter, has by descent any interest, legal or equitable, in the real estate devised by it. The will is in these words:—[His Honor here read the will.]

This instrument, untechnically and illiterately worded, nor very clearly expressed, may be well supposed to have been made by the testator, who is described in it as a victualler, without professional assistance. But I think that it exhibits, with sufficient certainty, an intention to give his whole property in some manner for the absolute benefit of his wife and such child or children as he should have living at his death. I think that effect may and ought to be given to that intention, and that his wife and surviving daughter must therefore be considered to have taken between them, in some manner, the entire beneficial interest in his real and personal estate upon his decease. This, however, they would of course have done, in some manner, if he had died intestate; the particular and specific question for decision being, whether the real estate was so devised, as to prevent the daughter from taking in it, by gift or descent, any interest, or any interest beyond the period of her life, except an interest transmissible and to be treated as personal estate—a question that renders it necessary to determine the meaning and effect of the direction to sell and convert into money.

If the phrase “at their arriving to the age of twenty-one years” were to be construed literally, it would not reach the case of one only of several children attaining that age. The testator might have had children born after his will, though as it happened he had not. The will does not exclude any such children. The words are “to be equally divided between my said wife, and as many children as she may have at my decease.” Nor does it require, or mention

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the attainment of any age, as a qualification or condition for taking under this gift. Had the testator left several daughters and a son, and they had all died minors leaving issue, could it have been maintained that the son should exclude the daughters from all participation in the *corpus* of the real property? But how, under this will, could that participation have been claimed, unless under the operation of the direction to sell and divide the proceeds? It appears to me, that it is consistent with authority and principle, consistent with sound rules of interpretation, to hold, that if the testator, in using the words "at their arriving to the age of twenty-one years," meant more or less than what might have been correctly expressed by the two words "subject thereto," he meant by them to say, "when there shall not be a child alive under twenty-one;" the clause that he has numbered three being to be read, in my opinion, substantially, as if it had preceded or formed part of the commencement of the clause numbered two.

I referred, during the argument, to the language of Sir *William Grant*, in *Murray v. Jones*, and to the numerous class of cases to which that case belongs, and which I think not irrelevant. The defendant's counsel seemed to rely considerably on another class of decisions, as to the relevancy of which, however, I do not give any opinion, beyond saying that if they have any bearing on the present will, that bearing is not, I think, favourable to the plaintiffs.

This testator, in my opinion, shews himself to have intended, that, in the event which happened of his wife, and also one or both of his daughters, surviving him, there should be positively and absolutely at some time, and not conditionally or contingently, a sale of the real estate. That time, I think, arrived at or before the widow's death, and, if the surviving daughter had any interest in the rents that accrued between her own decease and the decease of her mother, it was not, in my opinion, an interest capable of devolution from the daughter through her intestacy upon her heir.

I must hold, therefore, that she did not take by devise or descent from the testator legally, or equitably, any real estate descendible, or capable, upon her dying intestate, of devolving from her to her heirs; and that consequently her heiress-at-law can, in that character, have no claim. It follows that I must allow the demurrer, but it is not a case for costs. Assuming, indeed, the material facts upon the supposition of which the case has been argued to be true, I should, if I could, direct the costs of each party to be paid out of the estate.

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CHURCHILL v. MARKS.

Nov. 9th &
18th.

THE will of James Churchill, dated the 1st January, 1830, was partly as follows:—"I give and bequeath to my brother George Churchill, for his natural life, the interest or dividends from £5000 new 3*l*. 10*s*. *per cent*. government stock, which now pays a dividend at the Bank of England of £175; this said dividend, or any other dividend that Government may pay, shall be paid to him half yearly, if convenient, for and during his natural lifetime. He shall never sell or part with this said interest or dividend in any way whatsoever during his lifetime, until it is be-

Testator gave the dividends of £5000 stock to A. for life, and if A. should die, then to A.'s wife for life, she to lay it out for the good of A.'s children; but if she should marry again, she should have nothing more to do with the money, but the executors should have full power

over it, and lay it out as they should think best for such of the children as should remain under age; "and when the youngest child becomes of the age of twenty-one years, then this said £5000 stock shall be sold and the money shall be then equally divided between such of the said children that shall be then living, equally share and share alike. No one of the said children shall be allowed or shall ever sell or part with his or her share or interest in this said money until it shall be divided. If on proof of any one or more of them having done so, then his or her share will from that time become the property of the other children. This said stock to stand in the names of my executors." The testator died in 1831. A. died in 1836. A.'s wife died in 1843, without having married again. The youngest child of A. came of age in 1844. In 1841, J., who was one of the children of A., and who was afterwards living when the youngest came of age, having been arrested for debt, presented his petition and obtained his discharge under the stat. 1 & 2 Vict. c. 110, for the relief of insolvent debtors:—*Held*, that this was a "parting with" J.'s contingent reversionary interest in the capital stock within the meaning of the expression contained in the will, and further, that the restraint against alienation contained in the will was valid; consequently that the interest so parted with devolved to the other children of A., who were living when the youngest attained twenty-one.

Quære, whether a gift to A. in fee, with a proviso that if A. alien in B.'s lifetime, the estate shall shift to B., is valid?

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come due; and if he, the said George Churchill, should die or become a bankrupt, then this said dividend shall be paid to his said wife, if she shall be then living, for her life; she to lay it out for the good of his children: but if she should be the longest liver, and get married again, then she shall have nothing more to do with the money; the executors or executor shall then have full control over the money, and shall lay it out as they shall think best for such of the children as remain under age; and when the youngest child becomes of the age of twenty-one years, then this said £5000 stock shall be sold, and the money shall be then equally divided between such of the said George Churchill's children that shall be then living, equally share and share alike. No one of the said children shall be allowed, or shall ever sell or part with, his or her share or interest in this said money until it shall be divided. If on proof of any one or more of them having done so, then his or her share will from that time become the property of the other children; and when said stock shall become sold, his or her share shall be divided between those other children who shall not have sold: this said stock to stand in the names of my executors; and if Government should reduce this said interest, then it must stand in the reduced stock."

The testator died in 1831.

George Churchill died in 1836, leaving a widow, who died in 1843, and six children, of whom four only were living in January, 1844, when the youngest attained the age of twenty-one; namely, George, James, William, and Maria. Of these, George, William, and Maria, received from the plaintiffs, who were the representatives of the surviving executor and trustee of the testator's will, their respective fourth parts of the £5000 stock. The plaintiffs, however, under the following circumstances, declined to dispose of the share of James without the sanction of the Court.

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It appeared that, on the 27th July, 1840, James Churchill was arrested for debt at Stoke Newington, at the suit of the defendant Robert Marks; that, on the 31st of the same month, he was removed by *habeas corpus* and committed to the Queen's Bench Prison, and was there detained at the suit of Marks and another creditor; and that, on the 7th August, 1840, he being in actual custody within the walls of the prison, presented his petition to the Insolvent Debtors Court, under the stat. 1 & 2 *Vict.* c. 110, stating (amongst other things) that the petitioner was willing that all his real and personal estate and effects should be vested in the provisional assignee, according to the provisions of the act, and praying that he might be discharged.

On the 8th August, 1840, the Insolvent Debtors Court made the usual order for vesting the real and personal estate of the insolvent in the provisional assignee of that Court (a).

On the 3rd September, 1840, the insolvent, in pursuance of the act, signed a schedule containing, amongst other particulars, an account of his estate and effects in possession, reversion, remainder, or expectancy, and in that schedule he stated, that, under the will of James Churchill his uncle, he should be entitled, as he believed, equally with his brothers and sisters to one-sixth part or share of £5000 New 3*l.* 10*s.* *per Cents.*, then standing in the name of William Churchill, of Upper Islington, gentleman, but which he, under the will, had no power to assign.

This schedule was, on the 4th September, filed in the Insolvent Debtors Court. On the 27th February, 1841, that Court adjudged the insolvent to be entitled to the benefit of the act, and ordered him to be discharged, and he was discharged accordingly. And on the 29th

(a) See stat. 1 & 2 *Vict.* c. 110, sect. 37.

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March, 1841, the same Court appointed the defendant Marks assignee of the estate and effects of the insolvent.

The object of the bill was, to obtain the opinion of the Court as to whether the share of James belonged to the defendant Marks, as the assignee of James Churchill under the Insolvent Act, or to the other defendants, who were Lucy Churchill, the widow and executrix of George Churchill the younger, William Churchill, and Andrew S. Flintoff, and Maria his wife, formerly Maria Churchill, James Churchill the insolvent being out of the jurisdiction.

Mr. *Simons*, for the plaintiffs, submitted that the decision in the present case must follow that of *Brandon v. Aston* (a). He, however, called the attention of the Court to the circumstance, that the insolvency of James Churchill took place in the lifetime of George Churchill's widow, (the widow not having married again), and before the youngest of the children attained twenty-one. [The *Vice-Chancellor*. —I am disposed to think that *Brandon v. Aston* is not wrong.]

Mr. *Koe* and Mr. *Tripp*, for the defendant, the assignee. —The questions are, first, whether the acts of the insolvent are within the terms of the condition imposed by the will against alienation ; and, secondly, whether that condition is valid. In *Brandon v. Aston* the expression was "attempt to mortgage, encumber, or anticipate," which is more extensive than anything contained in this will. The words here, as applied to the children, are "sell or part with," which words have reference to an actual sale or disposition by the party himself, and do not apply to alienation by operation of law. Presenting a petition to the Insolvent Debtors Court is clearly not a sale, nor is it a *part-*

(a) 2 Y. & C. C. C. 24.

ing *with* the interest; for if the insolvent had died between the time of presenting the petition and the vesting order, could it have been claimed by the assignee? *Hibbert v. Carter* (a).

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Secondly, the clause in restraint of alienation is void. In the cases in which a clause of that sort has been supported, the party has taken an interest for life only. But when James Churchill took the benefit of the Insolvent Act, he had an absolute vested interest, although liable to be divested in the event of his dying before the youngest child of his father attained twenty-one. The gift to the children is not contained merely in the direction to pay. There is an absolute gift of the stock to trustees for the benefit of the tenant for life, and those in remainder. The interests, therefore, of the children being absolutely vested, though liable to be divested, a restraint on the alienation of such interests would be repugnant and void: *Litt.* sections 360, 361; *Co. Litt.* 206. b., 222. b., 223. a.; *Ross v. Ross* (b).

Mr. *Amphlett*, for the defendant Lucy Churchill.

Mr. *Wigram* and Mr. *Chichester*, for the other defendants.

In the course of the argument, an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be, that a gift to A. in fee, with a proviso that if A. alien in B.'s lifetime, the estate shall shift to B., is valid.

The VICE-CHANCELLOR.—My present impression is, that in this case there was a “parting with” the property within the meaning of that expression in the will. The next question is, whether the clause in the will restraining alien-

(a) 1 T. R. 745.

(b) 1 J. & W. 154.

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ation is effectual. Assuming that at the time of the vesting order the mother was alive, and was still the widow of George Churchill, and assuming that one of the children entitled contingently was a minor at that time, I think that the interest of the insolvent in the capital was, at that time, both contingent and reversionary. If there is any gift of the capital to the children, it is only in these words, "and when the youngest child becomes of the age of twenty-one years, then the said £5000 stock shall be sold, and the money shall be then equally divided between such of the said George Churchill's children as shall be then living, equally share and share alike." The gift, therefore, such as it was, was contingent; the widow, at the time of the vesting order, was entitled to the income; and, if the insolvent had died before the youngest child attained twenty-one, there would have been nothing coming to his estate. As at present advised, therefore, I am inclined to consider the clause against alienation valid. I will not, however, finally dispose of these questions now; and upon the latter point, I wish to hear further argument.

Nov. 18th.

The VICE-CHANCELLOR.—I have considered this case since Saturday week. The language of the will of the testator James Churchill is more brief and restricted than that which I had to construe in *Brandon v. Aston*. But I remain of opinion, that by means of the petition presented by the insolvent, the vesting order upon it, and his discharge so procured, he "parted with" his interest, if any, under the will, within the meaning of that expression contained in it.

It has been stated and admitted, that these proceedings took place after the deaths of the testator and the insolvent's father George Churchill, while the insolvent's mother was living the widow of his father, and while one of the living children of the insolvent's father mentioned in

the will was a minor. It has not been suggested that the widow did not duly perform the duty imposed upon her by the words "she to lay it out for the good of his children," words which, I think, certainly cannot be considered as extending beyond the income during her life. And, except such interest as the insolvent might have in the application of that income during her life, he had not, under the circumstances which I have mentioned, according to the true construction of the will, acquired, in my judgment, any present or any vested interest in any part of the fund in question at the time of presenting his petition, or at the time of the vesting order. Perhaps, however, these points (upon which, my opinion being against the assignees, the counsel for the other parties need not argue them) do not, so decided, conclude the question in dispute against the assignees, either as to participation in the income during the widow's life (she is, I understand, dead), or in the capital after her death. I collect, that the child, or one of the children, under age at the time of the vesting order, afterwards attained majority, and that there is not any minor child now living. I repeat, that I do not consider *Brandon v. Aston* to have been wrongly decided.

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His Honor then called upon the counsel for the assignees to argue the question as to the validity of the clause restraining alienation.

Mr. *Koe* and Mr. *Tripp* then argued that that clause was inconsistent with the clause containing the gift to the children, and was, therefore, repugnant and void. Admitting that the interest of the insolvent was contingent only, yet, with regard to the doctrine as to restraint upon alienation, the case was the same, whether there was a contingent absolute interest, or a vested absolute interest. *Bradley v. Peixoto* (a), *Brandon v. Robinson* (b), *Green v.*

(a) 3 Ves. 324.

(b) 18 Ves. 429.

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Harvey (a). [The *Vice-Chancellor*.—*Bradley's* case was an absolute interest in possession. The case at the bar is a contingent reversionary interest.]

THE VICE-CHANCELLOR.—Whatever might have been thought of this point a century and a half ago, I apprehend that decisions uniformly recognised as now binding have in effect established that a clause, worded as this clause is worded, is valid. They do not, perhaps, decide it in terms, but they do in spirit. Construing, therefore, this will as I do, I must hold that the clause of forfeiture, or shifting clause, is good.

Mr. *Koe* then applied to the Court to have the costs of the assignee paid out of the testator's estate, suggesting that he would be able to get no costs out of the insolvent's estate. But

THE VICE-CHANCELLOR, after referring to *Brandon v. Aston*, said, that he should make no order as to the assignee's costs.

IT being admitted that the presentation of the petition, the vesting order, and the discharge under the Insolvent Act, took place during the life of the widow, and while she was the widow of the testator's brother George Churchill, and while there was living a child of the widow, a minor, which minor afterwards attained the age of twenty-one, declare that the share of the insolvent in the £5000 New 3*l.* 10*s.* *per Cent.* Bank Annuities, went over to the other children of the said George Churchill who were living when the youngest attained twenty-one.

(a) 1 Hare, 428.

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Nov. 9th,
11th, & 25th.

JOHN WEDDERBURN the elder, being seised in fee of various large estates and plantations in Jamaica hereafter referred to, and being a partner in the house of Wedderburn, Webster, & Co., West India merchants, by his will, dated 6th August, 1819, directed, that all his just debts and funeral and testamentary expenses should be paid and discharged, in such manner as thereafter mentioned and directed, by his trustees and executors thereafter named, and after giving to his sister Katherine Wedderburn during her life an annuity of £250, to be in satisfaction of any annuity to which she might be entitled under the will of his late brother James Wedderburn (a), gave and de-

By the marriage-settlement of W., an annuity of £800 Jamaica currency was settled on his wife for life, and was subsequently charged on an estate of W., in that island. W. afterwards made his will, whereby he charged his estates in a certain manner with the payment of his debts; and

then, after reciting the settlement, and that he was desirous of making a larger provision for his wife, he gave her a rent-charge of £2000 per annum, for life, which he charged on the R. estate, and which was to be in lieu of all dower and thirds. Upon the death of W., the widow released her title, if any, to dower, and elected to take the £2000 annuity, and payments were made to her on account of it, by the executors. W., however, being at his death largely indebted to the firm of W. & Co., of which he was a partner, that debt was paid by his executors by means of a mortgage of the R. estate, and by the terms of the mortgage-deed the mortgagee was to hold the estate, subject to the several annuities given by the will of W., but *freed and discharged of and from the debts and legacies charged upon the premises by the will, and of and from all other charges and incumbrances whatsoever*. The assets of W. turned out to be insufficient for payment of all his debts:—*Held*, that a portion of the payments made by the executors to the widow must be ascribed to the annuity of £800 Jamaica currency, and were to that extent good, but that the residue of such payments were not good against the creditors of W. *Held*, also, there being certain arrears of the annuity of £2000, and a fund in court arising from the produce of the R. estate, that, as to that part of the fund which was not applicable to the portion of the annuity representing the annuity of £800 currency, the creditors of W. had priority over the mortgagee, as well as over the executors of the widow.

The owner in fee of two freehold estates largely indebted by specialty and simple contract devises one to A. B., in fee, charged with the payment of one-fifth, but only one-fifth, of all his debts, and devises the other to C. D. in fee, charged with the payment of the other four-fifths, but no further part of those debts. These devises are not within the proviso of the statute of Fraudulent Devises.

The compensation fund for slaves in Jamaica is legal assets for the payment of creditors.

Legacies given by different instruments, held, under the circumstances of the case, to be cumulative.

(a) James Wedderburn the elder, by his will, dated the 6th October, 1790, after giving an annuity of £250 to his mother, bequeathed as follows:—“Item, I give and be-

queath unto each of my dear sisters Katherine Wedderburn, Thomasina Wedderburn, and Robina Wedderburn, the sum of £200 sterling money of Great Britain, to be paid

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vised all his plantation and estate called The Prospect, in the parish of Hanover, in the island of Jamaica, with the lands, grounds, buildings, and other hereditaments thereto belonging, including therein all lands whatsoever belonging to him and then used, with all and every the appurtenances belonging thereto, and all and every the negro and other slaves whatsoever, and which should be in anywise belonging to said plantation estate and lands at the time of his death, unto and to the use of his eldest son James Wedderburn, his partner Andrew Colville, of Leadenhall-street, merchant; James Wedderburn, his Majesty's Solicitor-General for Scotland; and his partner Alexander Seton, of Leadenhall-street aforesaid, merchant, their heirs and assigns, upon trust that they his said trustees and the survivors and survivor of them, and the heirs and assigns of such survivor, should, in the first place, out of the rents and produce of the said plantation, estate, slaves, and hereditaments and premises, after paying and discharging all contingent charges and expenses whatsoever, (some of which were mentioned), pay to his second son John Wedderburn, until he should have attained the age of twenty-five years, the yearly sum of

within one year after my decease, and also to each of them during their natural lives respectively, an annuity of £55 sterling of Great Britain, to commence in one year after my decease." By a codicil, dated the 1st April, 1791, the testator, after willing that £100 should be added to his mother's annuity, bequeathed as follows:—"Item, My will is that £45 sterling be added to each of my three sisters, Katherine, Thomasina, and Robina, making to each of them an annuity of £100 sterling per annum, instead of £55 as mentioned in my said will; the same to be and continue during the natural life of each

of my said sisters." By an instrument, intituled "Heads of a Will," which was not signed by the testator, but which was admitted to probate in Jamaica, as a subsequent codicil, the testator after giving an annuity of £1000 per annum to his mother, for her life, to commence upon his death, bequeathed as follows:—"To my sisters Katherine, Thomasina, and Robina, I bequeath one hundred guineas each for mourning, and to each of them during their natural lives £120 sterling, to commence at same period, and for payment of said annuities subject all my estate real and personal."

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£1000 by equal quarterly payments; and in the next place should, out of the rents, issues, and profits, and produce of the said plantation, hereditaments, estates, slaves, and premises, from time to time purchase such number of negroes or other slaves, for the use of the same plantation, as should be sufficient to keep up the strength of slaves on the said plantation and the lands thereof equal to what the same should be at his decease, whilst his said trustees or trustee for the time being should continue to be in the receipt of the rents, issues, and produce of the said plantation, estate, slaves, and premises under or by virtue or for the purposes of that his will; and after applying such sum and sums of money for the several purposes aforesaid, as the same might become necessary, should in the next place retain the residue of such rents and profits, *and apply the same towards the discharge of his just debts, until one full and equal fifth part of the said debts should have been thereby paid and satisfied*, which he charged on the premises in exoneration of his personal estate; and when the trusts aforesaid should have been performed and satisfied, then should accumulate the residue and surplus of the said rents, issues, profits, and produce of the said plantation, hereditaments, estate, slaves, and premises during the time his said son John Wedderburn should be living, and under the age of twenty-five years; and subject as aforesaid, it was his will that they his said trustees, their heirs and assigns, should stand and be seised and possessed of, and interested in his said plantation or sugar-work called Prospect, with the land, grounds, buildings, and other hereditaments thereto belonging, and also all the negro and other slaves thereupon or thereto belonging as aforesaid, with their and every of their rights, members, and appurtenances, upon trust, by and out of the rents and profits thereof, or by any other lawful ways and means whatsoever, *to raise and levy so much money as should be necessary for payment of one full fifth part of his debts, which*

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he charged on the said premises in exoneration of his personal estate, or so much thereof as should not be raised under the trusts in that behalf thereinbefore declared, and for which monies the receipt of the trustees were to be sufficient discharges; and subject to, and charged and chargeable with such one-fifth part of his said debts, in trust for his said son John Wedderburn the younger, and the heirs of his body lawfully issuing, with remainders over.

The testator then gave certain directions concerning the accumulations of rent before mentioned. He then gave to his wife Mary Wisdom Wedderburn certain specific chattels and the sum of 500 guineas, to be paid to her immediately after his decease; and after reciting an indenture of settlement, bearing date 2nd July, 1788, and made between himself and his wife of the first part, his said late brother James Wedderburn the elder of the second part, and John Grayson, Esq., of the third part, he the testator had secured to his said wife during her life, if she should happen to survive him, a jointure annuity, or clear yearly rent-charge or sum of £800, current money of Jamaica, charged upon his plantation or sugar-work called Spring Garden, with the slaves, stocks, and appurtenances thereunto belonging, in the parish of Westmoreland, in the county of Cornwall and Island of Jamaica aforesaid, which annuity was in lieu of a like annuity secured to her by her marriage settlement, dated the 25th July, 1782, and also in bar of dower and thirds, and reciting, that he the testator was desirous of making a larger provision for her, he the testator gave, devised, and bequeathed unto his said wife and her assigns during her life, if she should happen to survive him, one annuity, yearly rent-charge, or sum of £2000 sterling, payable quarterly, and in lieu and satisfaction of all dower and thirds. And the testator declared, that, if his said wife should not, within eight calendar months after his decease, release to his trustees all the dower and thirds, and elect to accept the said annuity of

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£2000, together with the other legacies given to her, as a full compensation for the annuity of £800 currency, and all other claims by virtue of any settlement, and in satisfaction of dower, then the said annuity should cease and be absolutely void. And the testator charged the said annuity of £2000, and also an annuity of £50 to Miss Drummond, upon his plantation called The Retreat, in the parish of Westmoreland, in Jamaica, and his penn called Paradise, in the same parish, together with all the lands, buildings, works, slaves, stock, utensils, and effects thereto respectively belonging or appertaining, thereafter given and devised upon the trusts thereafter declared, and with powers of distress and entry for better securing such annuities.

The testator then, after giving certain annuities, gave unto his wife all his stock of wine and other liquors which should be in his dwelling-house in Devonshire-street, and in his dwelling-house at Chigwell-row, in the county of Essex, at the time of his decease. And he also gave to her his house in Chigwell-row, with the appurtenances, for her life. And he gave to her, during her life, the use and enjoyment of his plate and other specific chattels in and about his dwelling-houses; and after her decease, he gave her estate and interest in the said messuage or dwelling-house in Chigwell-row, and the grounds and premises thereto belonging, and also all chattels and effects the use and enjoyment of which he had thereinbefore given to his said wife during her life, unto his said son James Wedderburn the younger, his heirs, executors, administrators, and assigns, for his and their own use.

The testator then gave and devised all that his plantation or sugar-work called Spring Garden Plantation, situate in the parish of Westmoreland, in the island of Jamaica, together with all those penns belonging to the same plantation, or held and occupied therewith, and respectively called Negrill Penn and Mount Edgecombe Penn, and the lands

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thereof, together with all the out-buildings and appurtenances thereto respectively belonging, and also all and singular the negro and other slaves which should be upon or belonging to the same respectively, with their and every of their rights, members, and appurtenances, unto and to the use of the said Andrew Colvile, James Wedderburn, Solicitor-General, and Alexander Seton, their heirs and assigns for ever, upon trust, in the first place, out of the rents and profits of the same premises, *to raise so much money as might be requisite to make up the deficiency of his residuary real and personal estate for payment of the four fifth parts of his just debts*, and the whole of his funeral and testamentary expenses and legacies, and of the annuities which were respectively thereafter charged upon, and made payable out of the same, (for which monies so to be levied and raised the receipt or receipts of his said trustees or trustee were to be sufficient discharges) ; and subject thereto, in trust for his eldest son James Wedderburn, for his life, and after his decease, in trust for John Kellerman Wedderburn, son of the said James Wedderburn, and his assigns, for life, and after his decease, then in trust for his first and other sons, &c., in tail, with remainders over. And as to all and singular his plantations or sugar-works, penns, lands, tenements, slaves, and hereditaments in the island of Jamaica, not thereinbefore devised or disposed of, and all the live and dead stock, utensils, implements, and chattels, which at the time of his decease should be upon or belonging to, or used with said plantations, penns, lands, and estates respectively, and all the residue of his real and personal estate whatsoever and wheresoever, he gave, devised, and bequeathed the same respectively to his said son James Wedderburn the younger, if he should survive him, his heirs, executors, administrators, and assigns, subject to the annuities and other charges to which the same estates, or some parts thereof, were liable ; and also subject to, and charged and chargeable with the payment of

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four full and equal fifth parts of all and every the debts, of what nature or kind soever, which should or might be due and owing from him at the time of his decease, and the remaining fifth part of which were to be paid out of his aforesaid estate called Prospect, and the hereditaments and premises settled therewith, as thereinbefore was provided, and also the whole of his funeral and testamentary expenses, and of the legacies given by that his will, or by any codicil thereto. And the testator appointed his wife, Mary Wisdom Wedderburn, during her widowhood, and also his said eldest son James Wedderburn, and the said Andrew Colvile, James Wedderburn, Solicitor-General of Scotland, and Alexander Seton, executors of his said will.

The testator made two codicils to his will, by one of which he revoked the devise of his house at Chigwell-row, and directed the trustees to sell it, and invest the proceeds in the purchase of another residence for the use of his wife for her life; and he directed, that the house so to be purchased should, after her decease, belong to his eldest son absolutely.

The testator died in December, 1820, and his will was proved by his son James Wedderburn the younger, Andrew Colvile, and Alexander Seton. The widow, some time afterwards, executed a release of her claim of dower, and elected to take the annuity of £2000 given to her by the will.

At the time of the testator's death he was indebted to the co-partnership firm of Wedderburn, Colvile, & Co. in the sum of £42,650, that being the reduced amount of a much larger debt which had been due from his brother James Wedderburn the elder to the same house, in which he also had been a partner, and which debt was adopted by the testator.

Application having been made some time in 1830, by James Wedderburn the younger, to the plaintiff David

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Lyon, for the loan of a sum of £42,650, for the purpose of paying off the above-mentioned debt, and that application having been consented to, it was agreed between these parties, that repayment of the whole of the money advanced should be secured by the bond and warrant of attorney of James Wedderburn the younger, and also a mortgage of the Retreat and Paradise Penn estates, and an estate called Moreland; and it was further agreed between James Wedderburn the younger and his brother John, that, upon James's discharging the whole debt by means of such mortgage, John should give his brother a mortgage for one-fifth of the amount on the Prospect estate, pursuant to the direction in the testator's will, by which one-fifth of that debt was charged on that estate.

These arrangements were accordingly carried into effect by means of the bond and warrant of attorney of James, as before mentioned, disentailing deeds executed by John, of the Prospect estate, and by two sets of deeds of lease and release, which were to this effect:—

By indentures of lease and release, dated the 22nd and 23rd December, 1830, and made between James Wedderburn the younger of the first part, the plaintiff of the second part, and certain persons therein named of the third part, reciting the agreement between James Wedderburn the younger and the plaintiff; It was witnessed, that, in pursuance of such agreement, and for better securing the said sum of £42,650, &c., the said James Wedderburn the younger granted, released, and assigned to the plaintiff all those three several plantations or sugar-works called the Retreat, Moreland, and Paradise Penn, with the appurtenances, and all slaves, &c., and all copper, stills, &c., to hold all such parts of said premises as were of the nature of freehold or real estates unto and to the use of the plaintiff, his heirs and assigns, and all such parts as were chattel or personal estate unto the plaintiff, his executors, administrators, and assigns; but subject, never-

theless, as to the lands of the said penn called Paradise, to a right or privilege of pasturage thereon given by the will of John Wedderburn the elder in respect of the plantation or estate called The Prospect, and *subject also, as to such of the said premises as were charged therewith, to the several annuities in and by the same will given or bequeathed, or such of them as then continued payable*, and to the powers and remedies for recovering the same respectively when in arrear, but *freed and discharged of and from the debts and legacies by the same will charged and made chargeable upon the same premises, and of and from all other charges and incumbrances whatsoever*, and subject also, as to all the said hereditaments and premises, to a proviso or condition for redemption thereof on payment by the said James Wedderburn the younger, his heirs, executors, or administrators, to the plaintiff, his executors, administrators, or assigns, of the sum of £42,650, with interest for the same as therein mentioned.

By indentures of lease and release, bearing even date with the former, and made between John Wedderburn the younger of the first part, James Wedderburn the younger, Colvile, and Seton, of the second part, James Wedderburn the younger of the third part, John Watson of the fourth part, and other persons of the fifth part, reciting the agreement between John and James as before stated; It was witnessed, that, in consideration of £8530, being the amount of one-fifth of the debt due to Wedderburn & Co., having been paid off by James Wedderburn the younger, and for the other considerations therein mentioned, the said several persons parties thereto of the second part, acting at the request and by the direction of the said John Wedderburn the younger, and in the nomination of the said James Wedderburn the younger, did release and assign, and the said John Wedderburn the younger did release, assign, ratify, and confirm, unto the said John Watson, his heirs, executors, ad-

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ministrators, and assigns, all that plantation, sugar-work, or estate called the Prospect estate, to hold to the said John Watson, his heirs, executors, administrators, and assigns; subject nevertheless to a proviso for redemption upon payment by the said John Wedderburn the younger, his heirs, executors, or administrators, or the persons parties thereto of the second part, their heirs, executors, or administrators, or any of them, unto the said John Watson, his executors, administrators, or assigns, of the sum of £8530, with interest as therein mentioned.

By a deed of trust, bearing even date with the indentures of release, it was declared that Watson should stand seised of the Prospect estate, upon trust for the plaintiff, his executors, administrators, and assigns, for better securing to him and them the payment of the said sum of £42,650 and interest secured by the bond of James Wedderburn the younger, and subject thereto, in trust for the said James Wedderburn the younger, his heirs, executors, administrators, and assigns.

By an indenture of assignment, dated the 16th March, 1831, to which the partners in Wedderburn's house were parties of the first part, reciting the payment by James Wedderburn the younger to that house of £42,650, in discharge of the debt due to them from the testator's estate, the parties of the first part, at the request of James and John Wedderburn the younger and the plaintiff, assigned the said debt to William Lyon, his executors, &c., in trust to secure the sum of £42,650 due to the plaintiff, and then in trust for James and John Wedderburn the younger in proportion to their respective shares.

In April, 1831, James Wedderburn the younger died, having by his will charged all his real and personal estate with the payment of his debts and legacies, and having given powers of sale to his trustees over all his real estates, with a direction, subject to these provisions, to settle the real estates upon his son J. K. Wedderburn, at the age of

twenty-five, for life, with remainder to his issue in strict settlement.

The bill was filed against the executors of John Wedderburn the elder, and the same persons as administrators with the will annexed of James Wedderburn the younger, John Kellerman Wedderburn, John Wedderburn the younger, J. W. Wedderburn the eldest son and first tenant in tail *in esse* of the estates devised in strict settlement under the will of John Wedderburn the elder, Mary Wisdom Wedderburn, John Watson, and William Lyon. After stating the foregoing facts, together with other matters not material to the present report, the bill prayed an account and payment of the plaintiff's debt, and, if necessary, an inquiry as to prior incumbrances, and for a sale of the mortgaged premises, subject to such incumbrances, (if any), and for payment of the plaintiff's debt out of the proceeds, if sufficient, and, if insufficient, out of the other securities of the plaintiff in the bill mentioned, including the said debt of £42,650 and mortgage for £8530, as held by the defendants Lyon and Watson in trust for the plaintiff; and for that purpose, that the usual accounts might be taken of the real and personal estates of the several testators in the bill named and of their debts, and that the rents and proceeds of such estates might be followed in the hands of the executors and devisees of the testator, &c., and for a foreclosure of the mortgage for £8530, and for receivers of the personalty, and consignees of the realty, &c.

The cause came on for hearing in August, 1833, when a decree was made directing the usual accounts to be taken of the real and personal estates of the several testators and of their debts and legacies, and for the application of the personalty in a due course of administration; with directions to the Master to ascertain the priority of incumbrances (if any) affecting the real estates; with liberty to state any circumstances specially.

In March, 1835, Mrs. Wedderburn, the widow of the testator John Wedderburn the elder, died, and some years

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However, the Master found the charges to be reasonable and a bill of review and amendment was filed against the executor's account and decree of those charges: and in that case a decree was made whereby the charges and amounts claimed by the executor were ordered to be paid.

In February 1894 the Master made his report whereby he found that the executor's debt was on the 30th April 1894, £3,404. 12. 6d. and that the amount of it which was due to the executor's estate had been reduced at that time to £2,777. 12. 6d. and he found the total amount of debts owed against the estate of John Wedderburn the elder to be £309,927. 12. 6d. of which the amount of specialty debts was £5,242. 12. 6d.: and that of those specialty debts one amounting to £29,544. was due to the trustees of the settlement made upon the marriage of James Wedderburn the younger with Isabella Lyon, under which settlement John A. Wedderburn is a child of that marriage was interested. The Master further stated that a claim had been made against the estate of John Wedderburn the elder, which he the Master had not yet allowed, but in reason of which he had disallowed various payments made by the executors: it appearing to him to be a prudent judgment in consequence of the before-mentioned claim, whether the assets of the testator John Wedderburn the elder would be sufficient to pay his debts. In the payments so disallowed by the Master were included payments made by the executors in account of legacies and annuities given by the testator's will, the whole of which except some portion of the annuity of £3000 given to Mrs. Wedderburn, had been paid by the executors.

With respect to the devise and bequests made to Mrs. Wedderburn, the Master reported, that, after the death of the testator John Wedderburn the elder, the house and furniture at Chigwell had been sold, with Mrs. Wedderburn's consent, and that in lieu thereof James Wedderburn

the younger, as one of the executors and residuary legatees of John Wedderburn the elder, agreed to pay her out of the testator's estate, and did pay her, so long as he lived, an annual sum of £400. The Master further found that the annuity of £2000 given by the will of John Wedderburn the elder to Mrs. Wedderburn had been paid to her to the 1st April, 1831, and that the annuity of £400 had been paid to her to the 1st May, 1831, and that there was due, at the date of the report, to the executors of Mrs. Wedderburn, on account of the arrears of those annuities, the sum of £9000. He also found that there were funds in court arising from the produce of the several estates of the testator.

The cause now came on for hearing for further directions.

The principal questions were—

1st. Whether, as between the executors and creditors of John Wedderburn the elder, the executors were entitled, notwithstanding Mrs. Wedderburn's election to receive the £2000 annuity, to ascribe a part of the payments made by them in respect of that annuity to the prior annuity of £800 currency, and to that extent to take precedence of the creditors.

2ndly. Whether, assuming that Mrs. Wedderburn was not entitled as against the creditors to receive the remaining part of the annuity of £2000, that is to say, that part which was not referable to the £800 *per annum* currency, or supposing her representatives to disclaim all interest in that part, the plaintiff, as mortgagee of the Retreat estate, upon which the annuity of £2000 was charged, was entitled as against the creditors to the arrears of that part.

3rdly. Whether the assets of John Wedderburn the elder, consisting of a share of compensation money for slaves and of lands in Jamaica, were, independently of his will, legal or equitable assets for the payment of creditors; and if independently of his will they were legal assets, whether by his will he had made them equitable.

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The following statutes have reference to this last point:—

The Jamaica Act, of 1 *Geo. 2*, c. 1, by which it is enacted, that all such laws and statutes of England as have been at any time esteemed, introduced, used, accepted, or received as laws in this island, shall and are hereby declared to be and continue laws of his Majesty's island of Jamaica for ever (a).

The English statute, 5 *Geo. 2*, c. 7, s. 4, which enacts, that the houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said plantations, (*viz.* British plantations in America), belonging to any person indebted, shall be liable to, and chargeable with all just debts, duties, and demands, of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold, or disposed of for the satisfaction of debts.

The Jamaica Act, 24 *Geo. 2*, c. 19, regulating executions against lands (b).

The English statute, 37 *Geo. 3*, c. 119, which repeals the 4th section of the 5 *Geo. 2*, c. 7, so far as relates to negroes.

The Jamaica Act, 50 *Geo. 3*, c. 21, s. 2 (c), which is as follows:—“And whereas, in and by certain of the acts and clauses of acts herein and hereby repealed, provision was

(a) 1 Howard, 46.

2, p. 647.

(b) 1 Howard's Laws of the Colonies, 54; Burge Comm., vol.

(c) 1 Howard, 79.

made for making slaves assets for payment of debts and legacies, and in what manner they should descend and be held as property, and be conveyed in certain cases, and it is expedient to continue and amend such wholesome regulations; be it further enacted, that no slave shall be free by becoming a Christian; and for payment of debts and legacies all slaves shall be deemed and taken as all other goods and chattels are in the hands of executors or administrators, and where other goods and chattels are not sufficient to satisfy the said debts and legacies, then so many slaves as are necessary for the payment of debts and legacies shall be sold, and the remaining slaves, after payment of said debts and legacies, shall be judged, deemed, and taken as inheritance, and shall accordingly descend."

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Mr. *Russell*, having opened the case for the plaintiff, was proceeding to contend upon the first and second points, that this case differed from *Eland v. Eland* (a), when the *Vice-Chancellor* observed, that, if the representatives of the widow were disposed to give up their claim under the plaintiff's mortgage-deed, some distinction might possibly be drawn between the two cases; but otherwise they seemed not distinguishable.

Mr. *Roundell Palmer*, for the representatives of the widow, then disclaimed all interest under the mortgage-deed.

Mr. *Russell* and Mr. *James Parker*, for the plaintiff.—The widow's representatives having disclaimed, this case differs from *Eland v. Eland*. There the parties contesting were those for whose benefit the reservation was made, and those against whom it was made. No reservation was here made, or ever was intended to be made, for the creditors, although the widow's right was reserved. The plaintiff's security was made valid against all creditors. It

(a) 1 Beav. 235; 4 Myl. & Cr. 420.

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was to be subject to the widow's annuity, but "freed and discharged of and from the debts and legacies by the same will charged" upon the premises, "and of and from all other charges and incumbrances whatsoever." In *Eland v. Eland* there was a mere covenant against incumbrances, save and except the legacies, &c. In the present case, if the widow had released the annuity, could the creditors have come here to set it up? If she or her representatives think fit not to insist on the deed, can the creditors compel them to do so, in order that they may have the benefit of it? The creditors were not parties to the deed, and cannot, under the circumstances, insist upon it.

With respect to the nature of the assets, the plaintiff, being a specialty creditor of James, who was a simple contract creditor of John the elder, is interested in contending for equality of payment. We therefore contend that the lands in Jamaica and the compensation fund are equitable assets. In *Charlton v. Wright (a)*, it was expressly decided that West India estates may be devised so as to make them equitable assets, whatever be the construction of the stat. 5 Geo. 2, c. 7, s. 4. Now, before that act, it is clear, that lands in Jamaica would have been equitable assets under the same circumstances as lands in England, and there is nothing in the act to convert them into legal assets; on the contrary, they are to be assets in like manner as real estates are by the law of England. With respect to slaves, they are included in the real estate.

Mr. Burge, Mr. Wigram, and Mr. Rennalls, for the defendant John K. Wedderburn.—This defendant, being a specialty creditor to the amount of £28,000, is interested in obtaining a declaration that the assets are legal.

First, the lands in Jamaica are legal assets. When the stat. 5 Geo. 2 was enacted, there were no colonial lands which were not treated as chattels (b). They were included

(a) 12 Sim. 274.

(b) See 2 Vent. 358.

in the same writ and liable to the same process as chattels. That act was passed for the purpose of extending the rights of British creditors,—giving them a remedy for the recovery of every description of debt,—and not, it is conceived, for the purpose of altering the course of administration. If, however, it was intended that a devise should have that effect, yet the statute says that real estates in the island shall be assets “in like manner” as real estates are “by the law of England;” an expression which, when there is a devise for the payment of debts, necessarily introduces the question, whether the devise is effectual for that purpose: *Thompson v. Grant* (a).

2ndly, the slaves were personalty and legal assets. There was no heritable quality in the slave till the debts were paid. The executor had the first right to him. The slave passed by delivery, till, by an act of the legislature, a species of conveyance of him was rendered necessary. And it was not until the 16 Geo. 3, c. 15, (Jamaica legislature), that it was declared necessary that a will devising slaves should be executed with the formalities required by the Statute of Frauds. Except in these particular cases so provided for by the legislature, slaves were personalty. They were included in the writ of *venditioni exponas*, which has the force of a *ca. sa.* as well as a *fi. fa.* The circumstance, also, that the stat. 37 Geo. 3 repeals the 5 Geo. 2 as to negroes, shews that the legislature considered that a mistake had been committed in classing negroes with hereditaments. Being personalty, the exception in the Statute of Fraudulent Devises could not apply to a devise of them; and they were, therefore, legal assets, and the compensation fund is therefore legal assets.

3rdly, supposing that these assets (in themselves legal) were capable of being rendered equitable by devise, the will of the testator John Wedderburn the elder has not that effect. He has not provided for the payment of all his

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(a) 1 Russ. 540, n.

THE CASE OF THE DEVISE. The main of his debts on one side, and the other side, in *Forsyth v. Vassall* (a), the court said: "It is very true that Richard has devised his estate in trust for the payment of his debts which he had contracted by his will in his lifetime. And if this had been a devise of the residue of all his debts generally, undoubtedly the devise would have been good within the proviso of the Statute of Mortmain. But, as this devise was not of the residue of all his debts generally, this case is not within the proviso of that statute." The opinion of Lord Mansfield is supported by the decision in *Millar v. Forsyth* (b), which decision he has proceeded on the ground that the devise was for the payment of all the testator's debts. But where a devise for payment of debts does not extend to all in a practicable manner, the case is within the proviso of the statute: *Hughes v. Hughes* (c). Lord Mansfield in *Gott v. Atkinson* (d), further said: "I am of opinion that a devise of the residue of a testator's estate is good against bond creditors, though the proviso in the statute, (and possibly it may be within the scope of the proviso), yet that observation being made, that the devise is for payment of the testator's debts in full."

AS TO THE FACTS IN THE CASE, *Eland v. Eland* is conclusive.

Mr. Serjeant and Mr. Cairns, for the defendants the executors of John Warrington the elder, contended, that their clients were justified in making the payments which they had made to the widow, and that they were entitled, in settling the accounts, to deduct a portion of those payments of the sum of £200 per annum currency. The words of the will are different as applied to the widow's

(a) Barnes's Ch. Rep. 284, see p. 304.
(b) Coop. 45.

(c) 2 Bro. C. C. 614.
(d) Willes, 521; see p. 524.

dower and to the annuity. She was not called upon to release her annuity of £800 currency, nor was it the intention of the testator to deprive her of the benefits of a creditor. Yet, even if she had released the annuity, the release being made in ignorance of the state of the assets, she would have a right to fall back on the £800 *per annum* currency: *Kidney v. Coussmaker* (a); and if that was the position of the widow, the position of the executors must be the same.—They also cited, in reference to a point noticed by the *Vice-Chancellor* at the end of his judgment, *Suisse v. Lord Lowther* (b).

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Mr. Geldart, Mr. Wood, and Mr. Calvert appeared for other parties.

Mr. Russell, in the course of his reply, upon the question whether slaves were real or personal property, referred to *Burge's Commentaries on the Colonial Laws*, Vol. 1, pp. 561, 564.

The VICE-CHANCELLOR.—I have considered this case, and formed an opinion upon those points in it that are apparently the most important.

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It seems convenient to dispose, in the first instance, of the claim made by the testator's executors and trustees to be allowed for the payments made by them to his widow, in respect of the annuity of £2000 *per annum* bequeathed to her, so far as they ought to be ascribed (and certainly a due proportion of them ought to be ascribed) to the annuity of £800 *per annum* currency, to which she is agreed on all hands to have been entitled, independently of the will and codicils. If the report, as it stands, ought to be considered as precluding this claim, I should give leave to except, but I do not understand that objection to be taken.

The contention against the executors and trustees has

(a) 12 Ves. 136.

(b) 2 Hare, 424 ; see *ante*, p. 449.

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been, that the widow having, as it is said, conclusively elected to take under her husband's will and codicils, those instruments disclose an intention that the £800 *per annum* currency should, as to its priority, and for every purpose, be extinguished, but without reviving or giving any title to dower. I think, however, that the will and codicils ought not to be so interpreted, ought not to be considered as directing or requiring that the testator's general creditors should have precedence and priority over those rights which his wife had acquired by settlement after the marriage. It has not been contended, that the deed by which she released her title, if any, to dower, or any act done by her, except her mere election to take under the will and codicils, affected those rights. If, however, my view of the construction of the will in this respect is incorrect, (and I am not perfectly confident of its correctness), the same result may possibly be obtained in another way. The accounts were not fully taken nor the state of the assets ascertained, as I understand, in her lifetime. It may be, therefore, that her election to take under the will and codicils ought not to be treated as finally or conclusively made; and it may possibly be, that, as matters are now shewn to stand and to have stood, it was for her advantage not to elect to take under the will and codicils. Electing to claim against them, she would be, of course, entitled to the £800 *per annum* currency in preference to the testator's creditors. This priority, indeed, on one ground or the other, may be thought to be admitted by the language of the decree. It appears to me, on the whole, that the testator's executors and trustees are entitled to ascribe to the £800 *per annum* currency a due proportion of the payments which they made to the widow in respect of the £2000 *per annum*, and to stand so far above the creditors in her place, and that a declaration should be made accordingly.

Then comes the question as to the £9000, reported as

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due to her executor Mr. Freshfield. I am not sure whether I mistook the argument; I may have done so, but I understood it to describe the whole of this sum as referable to the £2000 *per annum*, and to describe the real estate at Chigwell as freehold. I collect, however, from reading the report, that this amount of £9000 is in part composed of arrears of the annuity of £400 *per annum*, agreed, after the testator's death, to be paid to his widow in lieu of certain claims under his will and codicils, including her interest in the real estate at Chigwell, and that this estate was copyhold. Not recollecting to have heard any argument as to the course, under these circumstances, to be taken with respect to that property or its produce, or with respect to so much of the £9000 as is referable to the £400 *per annum* currency, I had rather reserve, and I do reserve, these two matters altogether, giving leave, of course, (indeed wishing), that counsel should speak to them on the present occasion, or a future day. The nature of the Chigwell property may possibly have a bearing on the point of election if made.

The residue of the £9000 must be treated as apportioned between the £800 *per annum* currency and the remainder of the £2000 *per annum*, and, so far as it is referable to the £800 *per annum* currency, must, I suppose, be taken from the produce of the property specifically burthened with that charge, in preference to the claims of the plaintiff and of the testator's creditors, and be paid either to Mr. Freshfield, notwithstanding the disclaimer at the bar, or to the testator's executors and trustees, by reason of the payments made by them to the widow, in respect of the merely bequeathed portion of the £2000 *per annum*. To this, also, the counsel can speak, if they wish it.

With regard, however, to the remaining portion of the £9000, that I mean which represents arrears of the merely bequeathed portion of the £2000 *per annum*, the contest

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is merely between the plaintiff and the testator's general creditors; it being asserted for them, and he denying, that this part of the £9000 ought to be withdrawn, for their benefit, from the produce of the estate mortgaged to the plaintiff. Upon this question was cited *Eland v. Eland* (a), decided by Lord *Langdale* and Lord *Cottenham*, a case as to which I have been unable to free my mind wholly from doubt. Whether I should have considered it as absolutely binding on me, if I had formed and retained a strong or clear opinion against it, I need not say; for I have not a strong or clear opinion against it, and I think that I ought to follow it. The plaintiff's counsel have, however, argued reasonably and fairly, that, assuming *Eland v. Eland* to be a binding authority, the present case is distinguishable from it in a manner favourable to the plaintiff. I have considered the grounds of distinction suggested, and do not think them substantial, at least in his favour. I am not sure that the present case is not more favourable to the creditors here, than was *Eland v. Eland* to the creditors there. I doubted for some time whether the disclaimer of Mr. Freshfield, the widow's personal representative, might not be considered to vary the case in the plaintiff's favour, but I have come to the conclusion that it ought not. Following *Eland v. Eland*, I ought, I think, to treat the widow's annuity as expressly exempted from the operation of the plaintiff's security, as by agreement not touched by it, as being, therefore, left in her, notwithstanding that security; and, consequently, as so left, subject to the creditors' claims to the extent to which their claims were paramount. Upon that footing, they, therefore, continued to have an interest, which, as she could not displace by assigning, so neither could she, nor can her personal representatives, displace by disclaiming, as I conceive; although it is probably true, the qualification of the security as to the annuitants was not intended for the creditors' benefit, and

(a) 1 Beav. 235; 4 Myl. & Cr. 420.

although the plaintiff might possibly, though I do not say whether he could, have taken his security free from the merely bequeathed portion of the annuities, and did take it free in express terms from the claims of the creditors, who, to a certain extent, are thus admitted upon him through the widow's reserved title. It seems to me rather a hard case, but I think, that, if *Eland v. Eland* was rightly decided, it would be unsound to give the plaintiff what he asks in this respect. The creditors, therefore, or the specialty creditors, must take from him a portion of the produce of the estate mortgaged to him, equal to so much of the £9000 reported due as represents arrears of that part of the annuity of £2000 *per annum* to which the widow was not entitled by a right above the testator's will.

With regard to the question whether the compensation fund, representing the testator's slaves in Jamaica, is to be distributed as legal or as equitable assets, it appears to me, considering the acts of the colonial legislature of the reigns of *Will. 3* and *Geo. 3*, and the British statute of 37 *Geo. 3*, mentioned in the argument, that this fund must be treated, so far as the creditors are concerned, as personal estate, and, therefore, as legal assets. Upon principle, this point appears to me clear of doubt. I had some apprehension whether to decide so might not be in opposition to general opinion, or to settled habits or practice. I do not, however, think that there was sufficient ground for that apprehension.

As to the real estate, so far as consisting of lands in Jamaica, though I thought, and still consider, it doubtful whether property of this description was not made in effect equitable assets by the British statute 5 *Geo. 2*, c. 7; yet, as I only doubt, and as I am told that there is not any trace of such an interpretation having been put on the statute, and it is, I think, to be collected, that Sir *Thomas Bhamer* and the present *Vice-Chancellor of England* have both viewed it as not admitting that construction, I con-

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ceive that I ought to treat the statute as not having intended to place simple contract creditors on an equal footing with specialty creditors as to real estates in Jamaica.

It must next, however, be considered, whether it was competent to the testator to make this property by his will equitable assets; and, if he could do so, whether he has done so. The doctrine of equitable assets is based on the power which testators in England had before the reign of *Will. 3.* to disappoint their specialty creditors of all resort to their freehold estate by devising it. Had they not had such a power, or had the English legislature provided simply that freehold estates in England devised should be liable to specialty creditors in the same manner as freehold estates descending, or that all freehold estates in England, whether devised or descending, should be assets for the payment of all debts in the same manner as personal estate, there would have been no place for the doctrine of equitable assets. There is, as to real estates in Jamaica, the British statute of 5 *Geo. 2.*, already mentioned. If that makes all real estates there devised or descending applicable for the payment of debts, in the same manner as personal estate, it would seem difficult to say, how real property in Jamaica could be equitable assets. The statute, however, has the expression "in like manner as real estates are by the law of England liable;" a phrase, Mr. *Rennalls's* observation on which deserves attention. Nor must the authority of Sir *Lancelot Shadwell's* decision, in *Charlton v. Wright*, be forgotten. Mr. *Burge* has stated, and probably with his usual accuracy, that the Statute of Fraudulent Devises is generally understood and considered to have become incorporated into the laws of Jamaica, independently of the statute 5 *Geo. 2.* But, however this may be, I conceive it to be impossible to hold, consistently with the statute 5 *Geo. 2.*, that after it had passed it could be competent to a landowner in Jamaica so to devise his real estate there as wholly to disappoint his creditors; and

if he could not, he must, I think, in order to make it equitable assets, (supposing the law not to have made it absolutely, and of necessity, equitable assets), conform to the Statute of Fraudulent Devises, as part of the law of England mentioned in the statute 5 *Geo.* 2.

Assuming, then, that it was competent to the testator to make his plantations in Jamaica equitable assets in this way, and only so, has he done it? My impression is, that he has not; thinking, that, as the direction to pay the debts at the commencement of the will is expressed, it must be considered to be qualified and restrained by the subsequent provisions. This case, putting it in a manner as favourable to the simple contract creditors as its actual condition can be considered to warrant, may, I conceive, be stated thus:—The owner in fee of two freehold estates, largely indebted by specialty and simple contract, devises one to A. B. in fee charged with the payment of one-fifth, but only one-fifth, of all the testator's debts, and devises the other to C. D. in fee charged with the payment of the other four-fifths, but no further part, of those debts; that is to say, four undivided fifths of the general mass of debt. Neither upon principle nor upon authority am I satisfied that these devises are within the proviso of the Statute of Fraudulent Devises, that is, that they are such a provision for the payment of debts as to make the devised estates wholly or partially equitable assets. But if the Prospect estate had been subjected by the testator to the payment of the whole, and not merely one-fifth of his debts, in the same form and mode, however, in which he has provided for the fifth, I am not satisfied, considering the manner in which he regulates and directs the management of the property, (not forgetting especially his direction respecting the acquisition of slaves), that the Prospect estate would have been well devised against the statute, that is, would have been wholly or partially equitable assets; particularly as John Wedderburn, the de-

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visée of it, survived, and was but in the twenty-third year of his age at the death of the testator, for so I understand the fact to have been: nor, as to the Paradise and Retreat estates, if they had been charged with the whole, as, that is, exactly as, they are charged with four-fifths, of the debts, is it clear to me that they would have escaped the statute.

On the whole, my impression is, that, according to the proper construction of the Statute of Fraudulent Devises, there was not in this will a “devise or disposition of any real estate for the raising or payment of any real and just debt or debts.”

But, though I have upon reflection come to this conclusion, I cannot say that I have done so without hesitation, or that my mind is altogether free from doubt upon the point, which I think one of some difficulty, especially considering the case in *Sir George Cooper's Reports*, (with which I understand the Register's book to agree), and considering the possibility of applying one portion of the produce of a real estate devised—in the manner, for instance, in which the Prospect and Paradise property was by this testator—as equitable assets, and the remaining portion of it as legal assets. With my view, however, of the law, and the not improbable consequences of the precedent, if any part of the real estate or its produce were held to be equitable assets in the case before the Court, I prefer, that, if it is to be so held, it should be by other authority than mine.

I have not yet mentioned the allowances claimed by the executors in respect of their payments of Miss Katherine Wedderburn's annuities. They are entitled to these allowances, at least against that part of the testator's real estate which was made liable to her by the will and codicils of his brother James Wedderburn for the annuities that he gave her, to the extent of that liability. It seems to me clear, that of the three annuities given to her by James

Wedderburn, amounting together to £220 *per annum*, he meant neither by way of substitution or satisfaction for both or either of the others.

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* * * * *

It appearing by the pleadings, and being admitted by all the adult parties, that the testator John Wedderburn the elder was a trader at the time of his death, and the defendant John Kellerman Wedderburn, the heir-at-law of the testator John Wedderburn the elder, and also of the testator James Wedderburn the younger, by his counsel, admitting the due execution of the wills of the said testators,—Declare, that the sum of 3767*l.* 3*s.* 1*d.*, by the Master's general report found to be due to the plaintiff for principal money, on the security of the indentures of the 15th and 16th days of March, 1831, in the said report mentioned, with interest thereon at £5 *per cent. per annum*, from the 30th day of April, 1843, is the first charge on the estate called Prospect, in the said report mentioned. And declare, that the sum of 35,394*l.* 3*s.* 6*d.* (which includes the said sum of 3767*l.* 3*s.* 1*d.*, by the said report found to be due to the plaintiff for principal money, on the security of the indentures of the 22nd and 23rd days of December, 1830, in the said report mentioned) with interest thereon at £5 *per cent. per annum*, from the 30th day of April, 1843, is the first charge on the estates called Retreat, Moreland, and Paradise Penn, in the said report mentioned, subject only, as to the said plantations called Retreat and Paradise Penn, to the payment of the sum of £7500, being such part of the sum of £9000 by the said report found to be the amount due in respect of the arrears of the two several annuities of £2000 and £400, in the said report mentioned, as is attributable to the said annuity of £2000, and to which said annuity of £2000, with others which have been satisfied, the plaintiff's security under the last-mentioned indentures was as to the said plantations called Retreat and Paradise Penn expressly made subject. And declare, that so much of the said sum of £7500 as is attributable to the arrears of the annuity of £800 Jamaica currency in the report mentioned is applicable in payment of such arrears, and that the residue of the said sum of £7500 is applicable, as part of the general real estate of the said testator John Wedderburn the elder, in payment of his debts, together with the costs of these suits. But it appearing by the Master's report, and the accounts scheduled thereto, that the late defendant Mary Wisdom Wedderburn, deceased, on the 1st day of April, 1831, had received on account of the said annuity of £2000, a sum exceeding the full amount of all payments to which she would have been entitled in respect of such annuity or jointure of £800 Jamaica currency, if the same had been regularly paid up to the time of her death, and the defendants Andrew Colville and Alexander Seton, the administrators with the will annexed of the said testator James Wedderburn the younger, and the surviving executors and trustees of the will of the said testator John Wedderburn the elder, by

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their counsel, consenting thereto—Let the whole of the said sum of £7500 be applied, as part of the general real estate of the said testator John Wedderburn the elder, in payment of his debts, together with the costs of these suits, in manner hereinafter mentioned.

[The decree then provided for the sale of the several funds representing the produce of the Prospect estate, the Retreat, Moreland, and Paradise Penn estates, respectively, and the compensation money for the slaves on those estates, and for payment of the proceeds of such sales to the plaintiff in discharge of his debt, according to the proportions to be borne by the Prospect estate and the other estates respectively, with a direction that the surplus should be carried to the account of the creditors of John Wedderburn the elder.] And let so much of such monies and interest, when so carried over, as the Master shall certify to be the total amount of the specialty debts comprised in the first part of the last schedule, &c., with the interest and subsequent interest thereon, or the whole thereof, if the same shall be less than what the said Master shall certify to be the total amount of the said specialty debts and interest, be carried over and placed to the credit of the said cause, to an account to be intitled "The Specialty Debts Account." And let the residue of such monies and interest, if any, be carried over and placed to the credit of the said cause, to an account to be intitled "The Simple Contract Debts Account." And in case the cash, when so carried over to the said account to be intitled "The Specialty Debts Account," shall not be sufficient to pay such specialty debts in full, let the Master apportion such cash between the said specialty creditors, according to the amount of their respective debts; and out of the cash, when so carried over to "The Specialty Debts Account," let what the Master shall certify to be due to the respective specialty creditors of the said testator John Wedderburn the elder, for principal and interest and subsequent interest as aforesaid, or what shall be apportioned to them respectively, be paid to such creditors respectively, &c. And let the Master apportion the cash, if any, when so carried over to "The Simple Contract Debts Account," among the simple contract creditors of the said testator John Wedderburn the elder, according to the sums reported or to be reported due to them for principal and interest and subsequent interest as aforesaid. And let the monies so apportioned be paid (a) to such creditors respectively, &c.

(a) The operation of this part of the decree was partially suspended in February, 1845, upon the application of the parties in-

terested in the claim referred to in the Master's report. See *ante*, p. 260.

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ROCK v. COOKE.

Nov. 5th.

THE bill, which was filed on the 5th February, 1844, by a simple contract creditor of the late Sir Gregory Page Turner against his executors, alleged, that, in and prior to the year 1823, Sir Gregory Page Turner became indebted to the plaintiff in divers sums of money to a considerable amount, which were secured by the promissory notes of the debtor; that, in the year 1823, the plaintiff brought his action on these notes against Sir G. P. Turner, in which, in December of that year, he was arrested; that, subsequently, in the same month of December, a commission of lunacy issued against Sir G. P. Turner, under which he was declared a lunatic as from the 1st July, 1823; that, on the 22nd June, 1825, Sir G. P. Turner, by his committees, filed a bill against the plaintiff, praying to have the notes delivered up, or that they might stand as a security for what was really due, and for an injunction to restrain the action; that the plaintiff put in his answer to that bill; and that, by an order of the 27th July, 1825, made in that cause, it was ordered, by consent of the plaintiff, that the detainer in the action should be discharged and the action discontinued, and that the plaintiff should go in and establish his claim under the lunacy; that divers proceedings were had in the lunacy, but that they were not finally wound up, and that the plaintiff's claim had never been allowed, and that he had been unable to obtain payment; that, in 1841, Sir G. P. Turner, during a lucid interval, made his will, by which he directed payment of his debts, but that he remained generally a lunatic till the 6th March, 1843, when he died.

To this bill the defendant demurred generally for want of equity.

In 1823 an action was brought upon a promissory note, and the debtor was arrested. Soon afterwards the debtor was declared a lunatic; and in 1825, he, by his committees, filed a bill to restrain the action. In July, 1825, an arrangement was made and carried into execution by an order of this Court, whereby the action was stayed, and the creditor agreed to establish, and did proceed to establish, his debt under the lunacy. In 1843, however, and before the Master acting in the lunacy had made any report as to the creditor's claim, the lunatic died. The creditor then filed his bill against the lunatic's executors:—*Held*, upon demurrer, the Court having no judicial knowledge of the effect of the death of the lunatic upon the proceedings in the lunacy, that the claim

of the plaintiff was not barred by lapse of time.

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It was admitted at the bar, that the Master, by his report in the lunacy, had stated that he had allowed some of the debts, but that others in his opinion required investigation, and that he had made no report either in favour of or against the plaintiff's claim.

Mr. *Wigram* and Mr. *Freeling*, in support of the demurrer, contended, that the plaintiff's claim was barred by the Statute of Limitations; that, although the Court would relieve against the effect of the statute where an injunction had been improperly obtained, yet in no case would that relief be given where the order for the injunction had been made by consent of the adverse party: *Pulteney v. Warren* (a), *Bond v. Hopkins* (b); and, consequently, where the delay in the proceedings at law had arisen in part by that party's own act: *Fyson v. Pole* (c). Moreover, that, in this case, the plaintiff had bound himself to proceed under the lunacy, and must take the consequences. He had a complete remedy under the lunacy, and if he had neglected to avail himself of it, it was his own laches. The death of the lunatic did not affect his rights in that respect: *Ex parte M'Dougal* (d). [The *Vice-Chancellor*.—Suppose Sir G. P. Turner now to be alive, and not to have recovered, would the plaintiff be precluded from establishing his debt, the Master not having reported finally against him?]

Mr. *Russell* and Mr. *Glasse* *contrà*, after suggesting that *Ex parte M'Dougal*, and some other cases of the same kind, were at variance with the case *In re Barry* (e), were stopped by the Court.

The VICE-CHANCELLOR.—It does not appear to me

(a) 6 Ves. 73, 92, 93.

(b) 1 Sch. & L. 413.

(c) 3 Y. & C. 266.

(d) 12 Ves. 384.

(e) 1 Molloy, 414.

that I ought, for the present purpose, to infer, that, so far as the jurisdiction in lunacy is concerned, the plaintiff is precluded from establishing his claim by reason of the lapse of time. I think that I ought not, upon this record, to infer, that, if Sir G. P. Turner were alive, and the lunacy had continued, it would not still be competent to the claimant to go before the Master and establish his rights. Assuming that to be so, there was, at the time of the death of Sir Gregory Page Turner, a demand against him for which, if truly existing, (and I must treat it on this record as truly existing), a remedy was open. I am not bound judicially to know the rules of practice in lunacy; and even if the course of practice in lunacy be such as has been represented, I do not know that it is so fixed as to preclude the person entrusted by the Crown with the administration in lunacy from departing from that course. I cannot say whether the plaintiff has now the means of establishing his debt in the lunacy. If he has not, the remedy which he had at the death of Sir G. P. Turner does not now exist; and, if he cannot have the remedy for which the action was stayed, is he now to be precluded, the alleged debtor being dead, from suing his executors? I am of opinion, that upon this record it would be imprudent to say so, by allowing the demurrer. I, therefore, shall allow this cause to go on. Overrule the demurrer, without prejudice to any question that may be made at the hearing of the cause, and reserve the costs.

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Nov. 6th.

Purchaser discharged from his agreement upon a doubt whether the land was not bound by a covenant of which he had not notice.

BRISTOW *v.* WOOD.

BY indentures of lease and release, dated respectively the 15th and 16th of May, 1833, a piece of land known by the name of The New Key, situate near Liverpool, was conveyed to the plaintiff Bristow in fee; and by indentures of lease and release, dated respectively the 16th and 17th of November, 1833, Bristow, for the consideration mentioned in the release, conveyed a portion of the same piece of land to Jenkins in fee.

The indenture of release of the 17th November, 1833, contained the following mutual covenant:—"And the said Simon Bristow, for himself, his heirs, executors, and administrators, as to that part of the field called The New Key which is not conveyed by him to the said Henry Jenkins and his heirs, hereby covenants with the said Henry Jenkins, his appointees, heirs, and assigns, and the said Henry Jenkins, for himself, his heirs, executors, and administrators, as to the said part of the field hereby conveyed to him, hereby covenants with the said Simon Bristow, his appointees, heirs, and assigns, that no houses in courts, or any houses of less value than £300, shall be erected or built upon their respective parcels of land, or any part or parts thereof; and that they, the said Simon Bristow and Henry Jenkins, respectively, shall not, nor will, erect, or permit or suffer to be erected or made upon the same respective parcels of land, or any part or parts thereof respectively, any steam-engine or manufactory, nor carry on, nor permit or suffer to be carried on, in or upon the same, or any building to be erected thereupon, any trade or business whatsoever which can, shall, or may be considered a nuisance to the neighbourhood."

Bristow subsequently entered into an agreement for sale of the remaining portion of The New Key (with other property) to the defendant Wood, in fee simple in possession,

free from incumbrances. An objection, however, was taken to the title, on the part of the defendant, on the ground that the covenant which had been entered into, and of which the defendant had no notice when he signed the contract, was not merely personal, but ran with the land; and this objection having been persisted in, the present bill was filed to enforce the performance of the agreement.

The Master having reported in favour of the title, an exception was taken to his report on the part of the defendant.

Mr. *Russell* and Mr. *Rudall*, for the exception, cited *Lawrence Pakenham's case* (a), *Spencer's case* (b), *Holmes v. Buckley* (c), *Duke of Bedford v. Trustees of the British Museum* (d), *Keppell v. Bailey* (e), *Peel v. Wilks* (f), *Whatman v. Gibson* (g), *Schreiber v. Creed* (h).

Mr. *Wigram* and Mr. *Smythe*, *contra*.—The covenant was introduced into the deed for the amelioration of the property; it is clearly a beneficial covenant. Whether it runs with the land or not, must depend on whether there is privity of estate between the covenanting parties; in order to make it run with the land, it is not sufficient that it should concern the land: *Webb v. Russell* (i), *Roach v. Wadham* (k). Now, although a covenant might be entered into, which might bind the assigns without their being named, yet, in this case, there is everything to shew that the parties did not intend to bind their assigns.

The VICE-CHANCELLOR was of opinion that the ques-

(a) 42 Edw. 3, fo. 3.

(b) 5 Rep. 16 a.

(c) Prec. Cha. 39.

(d) 2 M. & K. 552.

(e) Id. 517.

(f) In Ch., cor. V. C. K. B., not

reported.

(g) 9 Sim. 196.

(h) 10 Sim. 9.

(i) 3 T. R. 393; see p. 402.

(k) 6 East, 289.

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tion which had been raised by the exception was of too doubtful a nature to justify the Court in compelling the purchaser to accept the title.

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 14th.

Testator gave certain fee-farm rents and stock in the funds to trustees, upon trust to pay the annual produce and dividends to his two nieces M. and N. for their lives and the life of the survivor; and after the decease of the survivor of them *unmarried*, to convey or transfer the rents and the stock to the children of B.; with a proviso, however, that, if his nieces, or either of them, should marry, the trustees should have power to settle the share of the party marrying for her benefit and that of her husband and children; and

that, in the event of a marriage and children of the marriage who should attain twenty-one, (*but not otherwise*), the limitations over in favour of B.'s children should be void. And the testator gave the residue of his property to M. and N. absolutely. M. and N. both married, but had no children, and their settlements provided, that, in the event of their having no children, the persons interested under the will should take:—*Held*, that the children of B. were entitled.

Testator gave certain real and personal property to trustees, upon trust to pay the annual income to his two nieces, in equal moieties, during their lives: and, after the death of either of them *unmarried*, then upon trust to pay the whole income to the survivor during her life. Upon the death of one of the nieces who had *married*—*Held*, upon the construction of the entire will, that the survivor was entitled to the whole income for her life.

DOYNE v. CARTWRIGHT.

JAMES BRIDGES, by his will, dated the 2nd May, 1789, gave and devised his fee-farm rents, amounting to £63 *per annum*, payable out of certain estates in Northamptonshire, and also his rent-charge of £50, payable out of certain estates in Gloucestershire, and also a sum of £3000 stock, and all other his stock in the funds which might be standing in his name at his death, to trustees, their heirs, executors, and administrators, upon trust to pay and apply the said fee-farm rents and rent-charge, and the dividends of the stock, unto his the testator's two nieces, Annabella Kearney and Susanna Kearney, in equal moieties, share and share alike, for and during the term of their joint natural lives, subject nevertheless to the proviso or condition thereafter contained, in case they his said nieces, or either of them, should happen to marry as after mentioned; and, after the death of either of them his said nieces *unmarried*, then upon trust to pay the whole of the said fee-farm rents and rent-charges, interest and dividends, and annual produce unto the survivor of them his said nieces, during the term of the natural life of such survivor; and, after the decease of the

survivor of them his said nieces unmarried, then upon trust to pay the same respectively into the proper hands of his niece, Frances, wife of William Baldwin, for her life, for her sole and separate use; and after her decease upon trust to convey, assign, and transfer the said rents, rent charge, and stock to the children of the said Frances Baldwin, for such estates, and in such manner and form, as she should by deed or will, as therein mentioned, notwithstanding her coverture, appoint; and in default of such appointment to all and every her children, absolutely, in equal shares &c. Provided always, and the testator declared his will to be, that, if either or both of his said nieces, Annabella Kearney and Susanna Kearney, should happen to marry, in such case he thereby authorized and empowered them, the said trustees, and the survivor of them &c. to convey, assign, transfer, and pay, apply, settle, and assure one full, equal, and undivided moiety or half part as well of the said fee farm rents and rent charge, as also the said capital sum of £3000 stock, and likewise all other monies, stocks, funds, and government securities so given to them upon the trusts aforesaid, and every or any part or parts of such moieties respectively, to, for, and upon such uses, trusts, intents, and purposes, and with and under such powers, provisoes, restrictions, conditions, and agreements for the benefit of either and each of his said nieces who should so marry as aforesaid, or her or their respective husband or husbands, and child or children, either or any of them, as they the said trustees, or the survivor of them, or the heirs, executors, or administrators of such survivor, should in their discretion think fit for the interest of his said nieces respectively, and their respective children; and, in the event of the said last-mentioned nieces, or either of them, marrying and leaving any child or children who should attain the age of twenty-one years, then and in that case (but not otherwise) the said testator willed and declared that all the remainders

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over, thereinbefore by him limited and given in the said fee farm rents and rent charge, stocks, funds and securities, monies and premises, unto or in favour of his said niece Frances Baldwin and her children, as to a moiety thereof respectively, (if only one of his said nieces, Annabella Kearney or Susanna Kearney should marry and leave a child or children who should attain the age of twenty-one years), and as to the whole thereof, (in case they should both marry and leave such child or children as aforesaid), should cease, determine, and be absolutely void and of no effect; anything therein contained to the contrary thereof in anywise notwithstanding. And, after full payment of all his just debts, legacies, and funeral expenses, and the expense of proving his will, the testator thereby gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects, both real and personal, not thereinbefore by him particularly disposed of, unto his said nieces, Annabella Kearney and Susanna Kearney, share and share alike absolutely for ever. And he nominated and appointed the trustees to be joint executors of his will.

The testator died soon after the date of his will.

By an indenture dated the 4th June, 1790, and made upon the marriage of Susanna Kearney with the Rev. Edmund Cartwright, Susanna Kearney's moiety of the property comprised in the will of the testator, and also her contingent right to the other moiety, or the income thereof, in the event of her sister dying unmarried in her lifetime, were settled upon her for her separate use during the joint lives of herself and her husband, and after the death of either of them upon the survivor, and after the death of the survivor for the benefit of the children of the marriage; with a proviso, that in case there should be no child or children of the marriage, or being such, all of them such die before any of their shares should become vested or payable, the trustees should, after the death of

the survivor of the husband and wife, stand seised and possessed of the said moiety of the said rents and rent charge, and of the said stocks, funds, and other securities, and of the then future dividends, interest, and annual produce attending the same, in trust for such person and persons as should be then entitled to the same respectively, and for such uses, ends, intents, and purposes as were expressed and declared of and concerning the same respectively, in and by the will of the testator, James Brydges deceased, in that behalf.

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By an indenture, dated the 31st July, 1790, and made upon the marriage of Annabella Kearney with Charles Cartwright, Esq., her share of the property comprised in the will of the testator was settled in the same manner as her sister's share has been settled; the same persons being nominated and acting as trustees under both settlements, and being the same individuals who had been appointed trustees and executors under the testator's will.

There never was any issue of either of these marriages.

Charles Cartwright died in 1807. Edmund died in 1823. Annabella, the widow of Charles Cartwright, died in 1836, intestate as to her real estates. Susanna, the widow of Edmund Cartwright, was living at the time of the institution of the present suit, and was of the age of eighty-six, or thereabouts.

Mrs. Baldwin died in 1839, leaving several children, in whose favour she had at various times in her lifetime by deed, and also by her will, exercised the power of appointment given to her by the testator's will.

The plaintiffs were the real and personal representatives as well of the testator as of the surviving trustee under the will and settlements, and of Annabella Cartwright. The defendants were Mrs. Susanna Cartwright and Mrs. Baldwin's appointees, or their assigns.

The principal question was, whether, in the events that had happened, the Baldwin family took any interest in the

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property bequeathed by the will, there being no express provision made in the will for the case of the nieces dying married and without leaving children.

Mr. *Kenyon Parker* and Mr. *Boyle* for the plaintiff.—The testator never intended that the Baldwins should take anything if the nieces married. Upon the marriage of the nieces the trustees had a discretionary power of settling the property. They might have settled the whole upon the husband, or the wife, or the children. They did actually settle life interests on the husbands. Under these circumstances, the property has passed under the residuary clause in the testator's will to the parties entitled to the residue of his estate. No implied gift can arise to the Baldwins from the clause of revocation, any more than from a mere recital of an erroneous conception of right. *Dashwood v. Peyton* (a). At all events the heir-at-law ought not to be disinherited as to the fee farm-rents without express words. *Maberley v. Strode* (b), explains the meaning of the word "unmarried."

Mr. *Swanston* and Mr. *Glasse* for the defendant, *Susanna Cartwright*.

Mr. *Russell*, Mr. *Hodgson*, and Mr. *Wood*, for other defendants.

Mr. *Wigram* and Mr. *Wilcock* for others.

Mr. *Younge* for another.

The VICE-CHANCELLOR.—The testator gives a life interest to his two nieces, and to the survivor of them in case either of them die unmarried, and after the death of

(a) 18 Ves. 27.

(b) 3 Ves. 450.

the survivor, in case both die unmarried (which has not happened) he gives the property to the Baldwins; and it seems to me (though it is not necessary to decide the point) that, if there were nothing more in the will, the Baldwins would have taken nothing.

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But after having made these dispositions in favour of the Baldwins, and none in the event of the nieces marrying, the testator gives power to the trustees, upon the marriage of his nieces, or the marriage of either of them, to settle the property upon the husband and children in such manner as the trustees may think fit; he has not in terms provided for the issue, or even for the nieces themselves, except in the shape of giving the trustees a power. Settlements were made by the trustees, which left questions under the will open; in the event of there being no child, the property was to go as directed by the will. The will contained no provision for the event of the trustees making no settlement. Whether, if the trustees had made no settlement, the children of these ladies, having grown up to the estate of men and women, would have taken an interest under the will, I need not decide, as neither of the ladies ever had a child. It is also, under the circumstances of the case, unnecessary to say whether life estates were effectually given to the husbands of these ladies.

After having, however, given this power to the trustees to make a settlement upon his nieces and their children, the testator says: "And in the event of my last-mentioned nieces, or either of them, marrying, &c. [His Honor read this part of the will as far as the word "void." See ante pp. 483, 484]. According to the prior language of the will, if either of the nieces married, the remainders were not to take effect, but here he has said, that in the event of his said nieces, or either of them, marrying and leaving a child or children who shall attain twenty-one, (and *not*

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otherwise), the remainders shall cease and become void. If the former part of the will be taken alone, there was no remainder to cease. It is not a question, what is the precise letter of the will, but what is the sense of the whole, taken, not in the order and collocation of the sentences, but altogether. I think that the testator has explained sufficiently that in the event of the death of each of the nieces, without leaving a child who should attain the age of twenty-one, the Baldwins were to take. He has said this, in my opinion, perhaps not accurately, but not obscurely.

A question was then raised, whether the annual income of the fund arising after the death of Annabella Cartwright and in the lifetime of her surviving sister Susanna Cartwright, belonged to the sister or to the Baldwins.

Nov. 14th. The VICE-CHANCELLOR was of opinion, that taking into consideration the whole scope of the will, the words must receive a liberal construction, and that the annual income during the time mentioned went to the surviving sister.

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CRAIK v. LAMB.

JAMES GRICE, of Warrington, pawnbroker, by his will, dated the 18th February, 1837, after directing that all his just debts, funeral expenses, and the costs and charges attending the probate of his will should be paid off and discharged by his executors thereafter named, as soon after his decease as conveniently might be, gave several pecuniary legacies, and concluded his will thus:—"I give and bequeath all the remainder of my real and personal estate, and effects, of whatever the same may consist, unto and equally between and amongst all my relations who may claim and prove their relationship to me by lineal descent, share and share alike, and do hereby empower my executors, hereafter named, to make sale and absolute disposal of such estate and effects, and to distribute the same as aforesaid. The testator appointed Samuel Astles, John Craik, and Richard Woodfall to be his executors.

Nov. 12th, 13th & 22nd.
 Testator gave all the residue of his real and personal estate unto and equally between and amongst all his relations who might claim and prove their relationship to him by *lineal descent*. He had no wife or issue at the time of making his will, nor afterwards. He died, leaving several first cousins, his next of kin:—*Held*, that the first cousins were entitled to the residuary estate both real and personal.

The testator was at the time of making his will, and of his death, which latter event took place soon after the date of his will, seised in fee of three freehold messuages, in Warrington. He was also possessed of a considerable personal estate, out of which his debts, funeral expenses, and legacies were paid by his executors.

The present bill was filed by the surviving executor, for the purpose of obtaining the opinion of the Court upon the construction of the will, as regarded the interests of the residuary devisees and legatees.

By the decree made at the hearing of the cause the usual directions were given for ascertaining the heir-at-law and next of kin of the testator; and the Master was also directed to inquire whether the testator had, at the respective times of making his will and of his death, any and what relations by lineal descent.

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The Master, by his report, after finding the date of the will and the death of the testator, and that he was at the time of his death a widower, and did not leave any issue, and after stating minutely the pedigree of the testator's family, found that the testator had, at the respective times of making his will and of his death, relations by lineal descent, the defendants, Frances Lamb, John Blundell, Thomas Blundell, and Elizabeth Busworth, who were respectively first cousins, *ex parte paternā* of the testator; and that they were the next of kin of the testator living at the time of his death, *ex parte paternā*; and that the said Frances Lamb and John Blundell were the testator's heirs-at-law; and that the defendants, Nancy England and Elizabeth Hodgkin, were the next of kin of the testator, *ex parte maternā*, living at the time of his death, and were respectively his first cousins *ex parte maternā*. And the Master stated that no evidence had been laid before him of there being any other next of kin; that, in the pedigree left in his office, it was stated that there were persons (named) who, if living, and having proved their relationship, would be of the next of kin of the testator, or, if dead, leaving issue, whose issue would be the next of kin of the testator; but that no such proof had been adduced, but on the contrary it was stated to him that such persons were unknown.

The cause now came on for hearing for further directions.

Mr. *Spence* and Mr. *John Adams*, for the plaintiffs.

Mr. *Wigram* and Mr. *Busk* for the heirs-at-law, contended that the words "relations by lineal descent," meant descendants according to the course of law, and therefore the heirs were entitled to the entire real estate. But, supposing the expressions made use of by the testator to

be doubtful, they might be interpreted for the benefit of the heirs. *Cook v. Gerrard* (a), *Trent v. Hanning* (b).

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Mr. *Swanston* (with him Mr. *Grove*), for the cousins of the testator, *ex parte paternâ*, cited Co. Litt. 10 b, 23 b; Litt. sec. 389; and contended that the testator meant relations by blood, as distinguished from relations by affinity.

Mr. *Temple* (with him Mr. *Williams*), for the cousins, *ex parte maternâ*, mentioned the following lines in Shakespeare's play of King John; observing, that from the circumstances of King John's descent, the word "lineal" could not there be used in reference to a direct line of descent from father to son:—

Peace be to France; if France in peace permit
Our just and lineal entrance to our own (c).

Mr. *Thomas Turner* appeared for other parties.

(a) 1 Saund. 181.

(b) 7 East, 97.

(c) King John; Act 2, Sc. 1. The expressions "lineal descent" and "lineally descended," as confined to the case of a direct line of descent from father to son, seem to have been derived from the French of Littleton. See Litt. sect. 3. It is believed that no single words answering respectively to the words *lineal* and *linealment*, and used in the narrow sense in which Littleton employs them, are to be met with in the works of preceding writers. See Glanville, lib. 7, c. 4; Bracton, lib. 2, c. 31; Britton, p. 119 (*de successione*); Fleta, cap. 2, p. 372. And, although the

generality of writers since Littleton's time have copied or adopted his expressions, yet some of comparatively modern date, as Lord Hale and Sir Martin Wright, appear to avoid the use of them. It may be remarked that Littleton, who introduced the distinction between lineal and collateral warranties, (see Vaugh. 360, 366, 375; Butl. Co. Litt. 373 b, note (2)), found it necessary to qualify his definition of a "lineal warranty," by adding that it was not so called because the warranty descended from the father to his heir, but for other reasons; see Litt. sect. 703. And Lord Coke commenting upon this, observes, that

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Nov. 22nd.

THE VICE-CHANCELLOR.—Upon the question for decision in this cause, which is as to the meaning of three words in the will of James Grice, of Warrington, in Lancashire, pawnbroker, and is not, I think, without difficulty, I was willing, and perhaps desirous, to ask the opinion of a Court of law. This might have been done by a case stating the will, with a deviation from its actual language, in other respects neither extensive nor affecting the substance of the controversy. Each party having, however, expressed a wish that this should not be, and that I should, without any assistance from a Court of law, decide it, I have considered this point as well as I have been able.

The testator was born in the year 1772, was married once only, and had of that marriage an only child. The wife and child both died several years before the year 1837. The child died when less than three years old. The testator, after his wife's death, does not appear to have contemplated a second marriage, or to have supposed, or suspected, or to have had any reason for supposing or suspecting, that he had, or was likely to have, any issue, legitimate or illegitimate. His nearest relations in blood when his will was made were his first cousins, of whom there were six or more. He does not appear to have been at any time out of England. Thus circumstanced he made his will in 1837 in these words—[His Honor here read the will, and then proceeded.]

whether the heir be lineal or collateral, yet, if by possibility he might claim the land from him that made the warranty, the warranty is lineal. In this last instance, therefore, the word "lineal," even as used in Littleton, refers to the collateral as well as to the direct line of descent.

Notwithstanding, however, the foregoing remarks, it is scarcely necessary to observe that the word "lineal" has now a fixed signification which can be varied only by special circumstances. As to the effect of the expression "eldest male lineal descendant," see *Odde v. Woodford*, 3 Myl. & Cr. 581.

The dispute in effect is, whether the words "by lineal descent," in this will ought, as the heirs-at-law contend, to be read and understood as meaning "by lineal descent from me:" in other words, whether by "relations" the testator meant, as the heirs-at-law say he did mean, "descendants." Considering the circumstances that I have mentioned, it is impossible to suppose that there can be any reasonable person who would not be unwilling so to interpret the instrument unless compelled by necessity, that is, by some inevitable rule of law, to do so. Every man reading the will with a knowledge of the facts must believe, that, in all probability, the words "by lineal descent" were used ignorantly, or not advisedly, that the testator, probably, could not have intended to describe his own issue by the word "relations," or to say of his issue what he does as to claiming and proving relationship in the circumstances in which he stood, and that in all likelihood the testator wished not to die intestate as to his real or residuary personal estate. Still the words may be too strong against the next of kin to be surmounted. Are they too strong to be surmounted? That was at first my impression, an impression which has, however, though not without some difficulty, been removed from my mind.

Certainly, unless the words "by lineal descent" are understood, as the heirs-at-law contend they should be, they are mere surplusage, (subject, however, to the question as to the meaning of the word "relations"); while by so construing them, operation and effect are unquestionably given to them; a consideration generally, or often, of weight in questions of construction: nor is it to be forgotten that it lies upon those who allege that an heir is disinherited by a will, to prove that the will does so. Still, though unnecessary and unusual, it cannot I think be considered absurd or untrue to speak of proving collateral kindred to a man by lineal descent, meaning lineal descent from one

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of that man's progenitors; in no other way than which can collateral kindred exist. It is possible that the testator may have thought that "lineal" meant "legitimate." It is also possible, that, as Mr. *Swanston* suggested, the expression "by lineal descent" may have been used for the purpose of excluding persons connected with the testator merely by "affinity;" an observation entitled to considerable attention, if the word "relations" applied to persons, is, as he contended, not properly a term implying necessarily consanguinity. In Johnson's Dictionary, in Richardson's Dictionary, and in Bailey's edition of Facciolati, it is treated as extending to affinity; and the expressions "a relation by marriage," and "a relation in the law," as denoting connection by affinity, are popularly, whether correct or incorrect, of occasional if not of frequent use.

On the whole, as the circumstances in which the testator stood, and the frame and tenor of the will countervail, in my judgment, any argument derived from the mere superfluity of the words "by lineal descent," if they are superfluous, on the supposition that the heirs' contention is unfounded, as the words "from me," are not added to the words by "lineal descent," and as the words "from me," being absent, the three words present, construed as importing that the relations mentioned must be descendants of some progenitor of the testator, are neither false, nor contradictory, nor absurd, I think that it is not by any rule of law prescribed that they must be construed as meaning by "lineal descent" from the testator. If so, that is enough; for necessity only could produce such an interpretation in the circumstances of this case. My ultimate conclusion is, therefore, against the heirs-at-law, though I cannot represent myself as perfectly confident that it is correct. It must not be understood that I give any opinion whether the word "relations" comprehends within its proper meaning persons connected by

marriage, though not of kindred in blood ; in other words, whether relationship includes affinity.

DECLARE that the six persons found by the Master to be the next of kin of the testator are beneficially entitled to the residue of the testator's real and personal estate, in equal shares.

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FORBES v. LAWRENCE.

Nov. 22nd.

JOHN LAWRENCE, by his will, dated 1st November, 1832, after directing payment of his debts and bequeathing certain annuities and legacies, directed his executors to set apart and appropriate out of the public stocks of Great Britain, of which he the testator might die possessed, such a part or share as should be equivalent to the sum of £50,000 sterling, and to pay the whole of the interest, dividends and annual produce thereof to his wife for her life for her sole and separate use. And after the decease of his wife, the testator directed his said trustees to raise out of the said last-mentioned stocks, funds, and securities, the sum of £6500 sterling for the purposes in the will mentioned, and subject to the life interest of his wife in the said dividends, interest, and annual produce, and also subject to the said sum of £6500 directed to be raised as before mentioned, and subject to his said trustees' appropriating £10,000 sterling, part of the said principal sum of £50,000, in aid of his residuary estate, and to be disposed of as thereafter-mentioned, he directed that the said sum of £50,000, or the equivalent stocks, funds, and securities wherein the same might be invested, should be in trust for all the children of his brother Isaac Lawrence the elder, who should be living at the decease of his the testator's wife, in the manner and under the conditions mentioned in the will.

Testator gave the interest of £50,000 to his wife for life, and directed that after her death £10,000 should be set apart out of that sum, in aid of his residuary estate, and he directed that the interest of the monies arising from the sale and conversion of his real and personal estate not specifically devised or bequeathed, and also, of the £10,000 should be paid to A. for life. By a codicil the testator bequeathed to A. "the legacy or sum of £10,000, to be paid to him out of my residuary estate :"—
Held, that the sum of £10,000 given by the codicil was distinct from the sum of £10,000 given by the will.

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The testator then after devising a copyhold estate, directed and required his said trustees by and out of the said sum of £50,000 so directed to be invested for the benefit of his said wife, but subject and without prejudice to her life interest therein, to set apart and appropriate the sum of £10,000 sterling in aid of his residuary personal estate, and he directed the same to be applied and disposed of for the benefit of his brother Isaac Lawrence, his wife and children, in the same manner as was therein-after directed concerning such residue. And he gave, devised, and bequeathed all his freehold and his copyhold estates (except as before mentioned) and all his leasehold and personal estate to the same trustees upon trust as soon as conveniently might be after his death, to call in and convert into money the convertible personal estate, and to sell the real estate, and to stand possessed of the monies arising from such conversion and sale, and of the annual produce of his real and personal estate until such conversion and sale, and also of the said sum of £10,000 thereinbefore directed to be appropriated after the decease of his said wife in aid of his residuary estate, upon trust, that they, his said trustees, should lay out and invest the same in their names in government or real securities, and pay the dividends, interest, and annual produce thereof to his brother Isaac Lawrence for his life, then to Mary the wife of his said brother for her life, and after the death of the survivor of them, should stand possessed of the whole of the last-mentioned trust-monies, stocks, funds, and securities, and the dividends and interest thereof in trust for the children then living of his said brother Lawrence, in the manner and under the conditions mentioned in the will.

By a codicil, the testator, after reciting that he had, by his will, given certain annuities of £80, £50, and £30, to different persons named, revoked those bequests, and in lieu thereof, gave to the same persons annuities of £60,

£40, and £20, and added—"the same three last-mentioned annuities to be paid, and applied, and provided for, in the same manner in all respects as is by my said will declared concerning the annuities of £80, £50, and £30 thereby bequeathed; and I give and bequeath to my brother Isaac Lawrence, the legacy or sum of £10,000 to be paid to him out of my residuary estate."

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Soon after the death of the testator, the widow being alive, the executors paid to Isaac Lawrence his legacy of £10,000. They afterwards, however, under the advice of an eminent counsel, filed the present bill for the purpose of obtaining the opinion of the Court as to the propriety of that payment; it being suggested that by "*the* legacy or sum of £10,000" mentioned in the codicil, the testator possibly meant the sum of £10,000 mentioned in the will, in which case the legacy in question would not be payable to Isaac Lawrence until after the death of the widow, and being payable out of the £50,000, the general residuary estate would be left undiminished.

Mr. *Wigram* and Mr. *Stinton*, appeared for the plaintiffs.

Mr. *Russell*, Mr. *Kenyon Parker*, and Mr. *Hansard*, for the defendants.

The VICE-CHANCELLOR.—Without intending to speak disrespectfully of the opinion which has been given, I owe it to truth to say, that I see no difficulty in the case.

DECLARE that the £10,000 given to Isaac Lawrence by the codicil is a separate and distinct legacy from the £10,000 given by the will.

1844.

December 6th.

SUTHERLAND v. COOKE.

Testator, after bequeathing certain leaseholds for years to A., who died in the testator's lifetime, and after bequeathing several legacies, gave and bequeathed to trustees all his money in the Long Annuities, and other of the public stocks or funds, ready money, and securities for money, outstanding debts, and all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, upon trust in the first place, by sale thereof, or of so much thereof as should be necessary for that purpose to pay thereout all his debts and funeral and testamentary expenses and the legacies by him therein-before given, and subject thereto to pay the dividends and interest

thereof to B. for life, and after B.'s decease to permit C. to have the dividends and interest for life; and after the decease of the survivor of B. and C., he bequeathed the principal of the said trust fund to the children of D. :—*Held*, that the tenants for life were not entitled to the enjoyment *in specie* of the rents of the leaseholds and the dividends of the stock, but that the leaseholds and stock must be invested so as to be permanently productive for the persons entitled to it, according to the limitations of the will.

WILLIAM COOKE, by his will dated the 9th July, 1832, gave to his brother Robert Cooke, and his friends Robert Sutherland and Samuel Argill, their executors, administrators, and assigns, certain copyhold messuages; situate near the Commercial Road and Berner Street, in the parish of St. George in the East, to hold the same for all the residue and remainder of the several terms and interest therein upon trust, to pay the rents and profits thereof to his niece Mary Jones, for the term of her natural life, for her own sole and separate use and benefit; and after her decease the testator gave and bequeathed the same several leasehold messuages and premises to such person and persons, &c., as the said Mary Jones, notwithstanding her coverture by any deed or deeds to be by her legally executed, or by her last will, &c. should direct or appoint; and in default of such appointment the testator did thereby direct that the said leasehold messuages or premises should sink into and form a part of the residue of his estate and effects thereafter bequeathed, and to and for no other trust, intent, or purpose whatsoever. The testator then, after bequeathing various legacies, bequeathed as follows: "Also I give and bequeath unto the said Robert Cooke, Robert Sutherland, and Samuel Argill, all my money in the long annuities, and in all or any other of the public stocks or funds, ready money, and securities for money, outstanding debts, and all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature or kind soever the same

shall or may consist at the time of my decease not hereinbefore specifically disposed of, to hold and take the same and every part thereof unto the said Robert Cooke, Robert Sutherland, and Samuel Argill, their executors, administrators, and assigns, upon trust, nevertheless, and to and for the several persons, intents, and purposes following: (that is to say), upon trust, that they my said trustees, or the survivors or survivor of them, his executors or administrators, do and shall, in the first place, by sale thereof, or of so much thereof as shall be necessary for that purpose, pay thereout all my debts and funeral and testamentary expenses, and the several legacies by me hereinbefore given and bequeathed; and, subject thereto, to pay to, or permit and suffer, and sufficiently authorize and empower my said brother Robert Cooke to have, receive, and take the dividends and interest thereof to and for his own use and benefit for and during the term of his natural life; and from and after his decease upon further trust, to pay to, or permit and suffer Hannah Cooke, the wife of the said Robert Cooke, in case she shall survive him and be then living, to have, receive, and take the dividends and interest thereof to and for her own use and benefit for and during the term of her natural life; and from and after the decease of the survivor of them the said Robert Cooke and Hannah Cooke, upon trust for, and I do hereby give and bequeath the principal of the said trust fund, and the stocks and securities wherein or whereon the same shall be invested, unto, all and every the children of my deceased brother George Cooke as shall be living at the time of my decease, equally to be divided between and amongst them, if more than one, share and share alike, and to their respective executors, administrators, and assigns, for ever, to take as tenants in common, and not as joint tenants; and if only one, then the whole to such only child, his or her executors, administrators, and assigns, for ever." And

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the testator appointed his said trustees to be executors of his will.

Mary Jones died in the lifetime of the testator.

The testator died in November, 1834, without having altered his will. Robert Cooke survived his co-executor Argill, and died in September, 1836.

The bill was filed by the surviving executor against Hannah Cooke and the children of George Cooke who were living at the testator's decease, praying that the rights and interests of all parties in the testator's residuary estate might be ascertained and declared, &c.

Hannah Cooke died after the institution of the suit.

The clear residue of the testator's property consisted of a sum of £55 *per annum*, Government terminable Annuities, a sum of £44 *per annum*, Long Annuities, (both which sums were standing in the names of the executors), and the leasehold houses (held for years) mentioned in his will. The question was, whether, by the terms of the will, this property was to be enjoyed *in specie* by Hannah Cooke, the tenant for life, or to be converted for the benefit of the legatees in succession.

Mr. *Craig*, for the plaintiff, submitted, that the general rule established by *Howe v. Lord Dartmouth* (a) and *Caldecott v. Caldecott* (b) did not apply in this case, but that it was the intention of the testator that the property should be enjoyed *in specie*, and that so much only should be converted as was necessary for the payment of his debts and legacies. [The *Vice-Chancellor*.—Did the leasehold estates produce dividends and interest?] The testator did not think that the leaseholds would fall into the residue. In *Bethune v. Kennedy* (c), a case similar to the present, the enumeration of different species of the testator's property in the residu-

(a) 7 Ves. 137. (b) 1 Y. & C. C. C. 312. (c) 1 M. & C. 114.

ary clause led the Court to the conclusion that the property was not to be enjoyed in specie. [The *Vice-Chancellor*.—It may be an important consideration, tending to reconcile some of the cases, whether the gift of the residue precedes or follows the enumeration of particulars.]

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Mr. *Kenyon Parker* and Mr. *Giffard*, for the representative of Hannah Cooke.—In *Vaughan v. Buck* (a), the enumeration of particulars was prior to the gift of the residue. Here, it is clear as to the Long Annuities, that the dividends, *ultra* what was required to be sold for payment of the legacies, were to be enjoyed by the tenant for life: *Alcock v. Sloper* (b), *Collins v. Collins* (c), *Vincent v. Newcombe* (d). And as to the leaseholds, there is an express direction that, upon the death of Mary Jones, they should go with the residue, that is, with the property which was not to be converted. That was thought of importance in *Alcock v. Sloper*.

Mr. *Whitmarsh* and Mr. *F. Whitmarsh*, for the parties interested in remainder, were stopped by the Court.

THE VICE-CHANCELLOR.—I think that, if the cases of *Vaughan v. Buck* and *Vincent v. Newcombe* had come before me, I should have decided them as they were decided. Upon the cases of *Alcock v. Sloper* and *Bethune v. Kennedy*, it is not necessary for me (if it would be right) to offer any opinion: it is sufficient to say that the wills in those cases differed materially from the will in the present case.

The first question is, whether this is, *prima facie*, a residuary gift: it begins thus:—[His Honor here read the residuary clause as far as the words “in the first place”].

(a) Phill. 75.

(b) 2 M. & K. 699.

(c) 2 M. & K. 703.

(d) Younge, 599.

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Now, I am of opinion, upon all principle, and upon the course of decision, that this is *prima facie* a mere gift of the residue. The mere fact that there is an enumeration or mention of some particulars does not prevent the bequest from being in effect residuary, and residuary merely. If it is a mere residuary gift as to the whole, it must be followed by all the consequences of a gift of the residue; it must be put in a state permanently productive for the persons entitled to it, according to the limitations of the testator's will. It is said, however, that there is an intention sufficiently expressed upon the will which corrects the *prima facie* meaning of the words of the residuary clause; an intention either that the gift was to be specific, or, if the gift was not to be specific, that the property was not to be converted. Now, it lies upon those who allege such an intention to shew it; the question is, whether they have effectually done so.

Before we consider the words that are said to shew such an intention, we must recollect—first, that this is a gift of personalty only, that there is no gift of realty mixed with personalty—and, in the next place, that the words “ready money” are found between the words “stocks or funds,” and the words “and securities for money;” that the words “securities for money” are followed by the words “outstanding debts;” and that all these words are followed by the words “rest, residue, and remainder.” There is no trust for investment of the property; and it is said that the testator has left nothing for the law of conversion to operate upon. But can the ready money and securities, and the outstanding debts, whether secured or not secured, remain in the same state as they were at the time of the decease of the testator? This appears to me impossible to hold. The testator goes on to direct his trustees, “by sale thereof”—not by receipt or conversion, but by sale; applying those words, according to the construction contended for, to ready money and outstanding

debts—to “pay thereout all my debts and funeral and testamentary expenses, and the several legacies by me hereinbefore given and bequeathed”—words, exactly, which one would expect to find after a gift of residue—“and, subject thereto, to pay to, or permit and suffer, and sufficiently authorize and empower my said brother Robert Cooke to have, receive, and take the dividends and interest thereof to and for his own use and benefit,” &c.

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A fair observation has been made on the use of the word “dividends,” as capable of being attributed only to the Long Annuities. I cannot, however, in this will so read that word. It is, I think, a mere general mention of dividends as equivalent to income. I apply this observation, however, only to the present will. There may be many wills in which the word may receive a different interpretation.

The testator then, after the death of the survivor of Robert Cooke and Hannah Cooke, gives and bequeaths the “principal of the said trust fund, and the stocks and securities wherein or whereon the same shall be invested,” to the children of his brother George Cooke, &c. This is just the language which any testator would use in regard to any ordinary residue that he would expect to be invested in the general way. I am of opinion that I should be raising distinctions of a dangerous nature, if I were to hold that there was here anything of sufficient substance to justify a departure from the general rule.

By the decree, as drawn up by the registrar, it was declared, that, according to the true construction of the will of the testator, William Cooke, the late defendant Hannah

1845.
March 13th.
Where a will contains an implied, but no specific, direction for conversion of the

property, and by an innocent mistake it has been left upon the original security and the income enjoyed by the tenant for life *in specie*, the Court, upon the mistake being rectified, will, at its discretion, allow the tenant for life interest at the rate of £4 *per cent. per annum* upon the value of the property as taken at the expiration of one year from the testator's death.

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Cooke was not entitled to the actual dividends and rents which were produced by the Government Annuities for terms of years, and Long Annuities and leasehold messuages constituting the residue of the testator's personal estate, but was entitled, from the time of the death of her husband Robert Cooke, down to the time of her own death, to interest at the rate of £4 *per cent. per annum*, upon what was the value of the before-mentioned property at the end of one year next after the testator's death.

A motion was now made that the minutes of the decree might be varied by inserting therein a declaration that the Government Annuities for terms of years, Long Annuities, and leasehold messuages, constituting the residue of the testator's personal estate, ought to have been sold at the end of one year after the testator's death, and a declaration, in lieu of the declaration as to the £4 *per cent.* interest, that Hannah Cooke was, during the time before mentioned, entitled to such interest and dividends as would have been payable had the before-mentioned property been sold, and the produce of such sale invested in Bank £3 *per Cent.* Annuities.

Mr. *Whitmarsh* and Mr. *F. Whitmarsh*, in support of the motion, cited *Howe v. Lord Dartmouth* (a), *Dimes v. Scott* (b), *Benn v. Dixon* (c), contending, that, where the property was considered as converted and invested in the funds, the usual course was to allow the tenant for life interest at £3 *per cent.* only.

Mr. *Giffard*, *contrà*, referred to *Caldecott v. Caldecott* (d).

The VICE-CHANCELLOR.—There is, I think, no positive rule on the subject. A will may be so framed as to make

(a) 7 Ves. 137.

(b) 4 Russ. 195.

(c) 10 Sim. 636.

(d) 1 Y. & C. C. C. 737.

it the duty of the Court to consider the property as laid out in the *£3 per Cents*. But where there is no specific direction for conversion, and by an innocent mistake the property has been left upon the original security, my opinion is, that it has always been considered competent to the Court to allow the tenant for life interest at *£4 per cent.*; and I think that, consistently with *Howe v. Lord Dartmouth* and *Dimes v. Scott*, I may do so in the present case.

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SUTHERLAND
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MAUDE v. COPELAND.

1844.
Nov. 4th.

THE bill was filed against four partners, one of whom afterwards went to Madeira, having appointed one of his co-partners his attorney to act for him in his absence. A copy of the bill was served upon that partner as such attorney, and a special appearance was entered on behalf of the absent partner, under the 27th Order of August, 1841. Under these circumstances,

Mr. *Speed* now moved for leave to enter a memorandum of service upon the absent partner, under the 27th Order of August, 1841, upon the ground, that the defendant, having appeared, must be taken to have admitted that he was duly served with a copy of the bill.

Leave given to enter a memorandum of service of a copy of the bill upon a defendant who had put in a special appearance under the 27th Order of August—upon the ground, that the appearance amounted to an admission of service of a true copy of the bill.

The VICE-CHANCELLOR held, that the ground of the application was sufficient, and acceded to the motion.

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Dec. 3.

PARKER v. FORD.

Before answer to a bill of discovery, motion to expunge amendments, made with a view to converting it into a bill for relief, allowed.

THE defendant Ford had filed a bill for relief against the plaintiffs, who filed the present bill, a cross-bill, for discovery. Ford afterwards dismissed his own bill, upon payment of costs. Before the answer was put in to the bill of discovery, the plaintiffs amended their bill, by adding to it a prayer for relief.

Mr. *Swanston* and Mr. *Montagu*, for Ford, now moved, that the amendments might be expunged, and that their client might be paid his costs of the cross suit. They cited *Butterworth v. Bailey* (a).

Mr. *Russell* and Mr. *Winstanley*, *contrà*, cited *Severn v. Fletcher* (b), contending, that it was competent to the plaintiffs to make the amendment before answer.

The VICE-CHANCELLOR was of opinion, that the general rule of practice in these cases applied equally before answer and after answer, and granted the motion as to the amendments.

(a) 15 Ves. 358.

(b) 5 Sim. 457.

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THE GREAT NORTH OF ENGLAND CLARENCE AND HARTLE-
POOL JUNCTION RAILWAY COMPANY v. THE CLARENCE
RAILWAY COMPANY.

Nov. 13th.
Dec. 3rd.

BY the stat. 1 *Vict.* c. xcv, the plaintiffs were incorporated under the name and style of The Great North of England Clarence and Hartlepool Junction Railway Company. This act, was merely permissive, so far as regarded the interference of the company with private rights. It, however, contained an enactment, that, if the plaintiffs' railway should cross any other railway, whether public or private, the communication between the plaintiffs' railway and such other railway, and all openings in the ledges or flanches of the rails of such other railway, (if the same should be crossed upon a level), or, (if the same should not be crossed upon a level), then all bridges over or tunnels under the railway so to be crossed for the purpose of such crossing, should, if the plaintiffs and the parties to whom such other railway should belong did not agree about the same, be made in such manner as should be directed by the engineers of the respective companies, who, before entering upon the matter in dispute, should appoint an umpire.

Under this act the plaintiffs proceeded with their works to a considerable extent, but were ultimately stopped for want of sufficient powers; the defendants, who were incorporated under the name of the Clarence Railway Company, refusing to allow them to cross the Sherburn branch of their railway. Accordingly the plaintiffs obtained an act

Mandatory injunction in effect compelling a railway company to pull down walls which they had built, in order to prevent another railway company from crossing their line.

A railway act gives power to the A. company to build a bridge across the line of the B. company, provided that the width between the abutments of the bridge is not less than twenty-six feet. At the point where the bridge is to be built, the land of the B. company is forty-seven feet wide. The A. company have no right, within the meaning of the act, to build the abutments of their bridge upon the land of the B. company; but,

having purchased adjoining land for that purpose, they have a right at law to the temporary use of the land of the A. company for the purpose of their building; and *quære*, whether this Court, on motion for an injunction to restrain the obstruction of the works, has not jurisdiction to award and secure to them possession of such temporary easement?

An arbitrator appointed by certain acts of Parliament made an award, which was resisted by one of the parties interested, as being, and was, in fact, without any fraud in the arbitrator, invalid:—*Held*, that this circumstance did not affect the validity of a subsequent award made in the same matter between the same parties.

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of the 6 & 7 *Vict.* c. lxxxii, whereby, after reciting their previous act, and that it was expedient that their railway should be carried over the line of the Clarence Railway by means of a bridge, instead of on the level as contemplated by the recited act, it was enacted, that, notwithstanding anything in the said act or the present act contained, it should be lawful for the plaintiffs to construct and carry their said railway across the said Clarence Railway, by means of a bridge as thereafter mentioned, in the line or course defined upon the plans deposited with the Clerk of the Peace, &c., and also to construct and carry a certain branch railway, by the present act authorized to be made across a certain other intended railway mentioned in the act, without its being necessary for the plaintiffs to obtain the consent, in writing or otherwise, of the owners of the said Clarence Railway, and of the other line mentioned in the act, for that purpose: provided always, that such crossings and communications or junctions respectively should be made and executed under such powers, authorities, regulations, and control respectively as in said first-recited act were contained, except as regarded the prior consent of the owners of such railways respectively as thereinbefore mentioned, and except, as thereafter provided, with respect to the said intended bridge across the said Clarence Railway.

By the 21st section of the amending act it was enacted, that, for the purpose of carrying the plaintiffs' railway over the Clarence Railway, the plaintiffs should, and they were thereby required to construct and for ever thereafter maintain a good and sufficient bridge over the said Clarence Railway; and that the width of the said bridge between the abutments thereof should not be less than twenty-six feet, measuring the same in a line at right angles, as near as might be, with the line of direction of the said Clarence Railway; and that no part of the under side of the soffit of the said bridge should come within sixteen feet of the surface of the rails of the said Sherburn branch

of the Clarence Railway: provided always, that the said bridge should be constructed of such materials and in such manner as should be agreed upon between the engineer for the time being of the plaintiffs, and the engineer for the time being of the Clarence Railway Company; and in case the engineer for the time being of the Clarence Railway Company should not, within three weeks after the plaintiffs' engineer should have submitted to him a plan of the proposed bridge, signify in writing his assent thereto, then the materials of which, and the manner in which, the said bridge should be constructed should be referred to the surveyor of bridges for the county of Durham for the time being, whose decision should be binding and conclusive upon all parties.

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Immediately after the passing of the last-mentioned act, the plaintiffs directed their engineer to prepare a plan of a proper bridge, for carrying their railway across the Clarence Railway pursuant to the act. Accordingly a plan was prepared, and was, in September, 1843, delivered to the engineer of the defendants. It was, however, on the 4th of October, returned by him, with a notification that he required the Clarence Railway to be crossed by a bridge having a brick or stone arch.

The defendants' engineer not having given his assent to the plan within the three weeks mentioned in the act, the plaintiffs sent their plan to Mr. Bonomi, the surveyor of bridges for the county of Durham, who, after hearing a discussion between the engineers of both parties, made his award, dated the 23rd of November, 1843, whereby, after directing that the bridge should be constructed of such materials, and in such manner, as were mentioned in a plan annexed to his award, he, in the words of the Act of Parliament, ordered and declared that the width of the said bridge between the abutments thereof should not be less than twenty-six feet, measuring the same in a line at right angles as near as might be with the line of direction

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of the Clarence Railway, and that no part of the under side of the soffit of the said bridge should come within sixteen feet of the surface of the rails of the said Sherburn branch of the Clarence Railway, &c.

It appeared from the plan annexed to Mr. Bonomi's award, that the width of the intended bridge between the abutments did not exceed twenty-six feet, and was designed to cross the Clarence Railway, so as to leave an equal space on each side of the rails of that railway, between the rails and the abutments of the bridge, and that the width of the land belonging to the defendants at the place where the bridge was thereby designed to cross, (measured at right angles with the line of the Clarence Railway), was forty-seven feet, or thereabouts; so that it appeared from the plan itself, that the bridge could not be constructed in accordance with the plan, unless the abutments were allowed to rest on the land of the defendants, situate on each side of the rails of the Clarence Railway.

The defendants, conceiving that the plaintiffs had no right to build a bridge according to this plan, directed their servants and agents to prevent the plaintiffs from doing so; and accordingly, the plaintiffs having commenced their works upon slopes of land belonging to the defendants, on each side of the Clarence Railway, were by the repeated obstructions of the defendants, amounting in some instances to force, compelled to leave the premises. Some negotiations afterwards took place between the solicitors of both parties, but ultimately the plaintiffs' solicitor received from the defendants' solicitors a letter, dated the 7th of February, 1844, containing the following passages:—"The Clarence Railway Company consider that they have been very ill treated by the clandestine and uncandid proceedings of your clients, who, judging from the papers recently left by you with the Clarence Railway Committee, seem to have obtained an alleged award from Mr. Bonomi, and then to have suppressed it for about

three months. The Clarence Railway Company are completely taken by surprise by this alleged award, and they cannot in any way recognize the validity of it. Indeed, it appears wholly unintelligible; and no width or height of the proposed bridge being given, it is impossible to ascertain the proportions. * * * *

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The Great North of England Clarence and Hartlepool Junction Railway Company, and all other parties concerned, will be pleased to take notice, that the Clarence Railway Company will hold them trespassers if they enter the land of the Clarence Railway Company, and that the Clarence Railway Company consider all the proceedings connected with the alleged award irregular, void, and unjustifiable."

In consequence of this letter the plaintiffs resolved no longer to prosecute the works which they had begun, but to treat with the owner of the adjacent property for the purchase of land upon which to build the abutments of their bridge. They accordingly entered into a contract of that description with the Rev. R. H. Williamson; and in April, 1844, they caused to be served on the defendants a notice to the effect that they intended to abandon, and did abandon, their intention and right to build a bridge over or across the Sherburn branch railway at the place in question, in the manner or according to the dimensions described in the plan annexed to the decision of Mr. Bonomi, dated the 23rd of November, 1843; and did also abandon and relinquish all right, title, interest, and privilege which might then or at any other time belong, arise, or accrue to the plaintiffs under or by virtue of the said plan and decision, and would thenceforth treat the same as absolutely null and void. And they further gave notice that their engineer would deliver to the defendants' engineer, on or after the 4th of May then next, the plan of a bridge proposed to be erected or constructed by the plaintiffs over and across the Sherburn branch railway pursuant to the provisions of the act.

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In reply to this notice the defendants intimated that they did not acquiesce in the course taken by the plaintiffs, and, in the following month, having in the mean time been furnished with the plaintiffs' new plan, they served a notice upon the plaintiffs, containing, amongst others, the following passages:—"We hereby protest against your adopting the course intimated to us by that notice. We are advised, and hereby give you notice, that, inasmuch as you assert or imply in your said notice that such an award or decision has been already made under the hand and seal of the said Ignatius Bonomi touching a bridge proposed to be erected or constructed by you over and across the Sherburn branch of our railway pursuant to the provisions of the act of Parliament mentioned in your said notice, it is your bounden duty, if you are aware that such alleged award or decision has been clandestinely or otherwise improperly obtained by you, or is in other respects defective or insufficient, to take the proper steps for setting aside the said award or decision, if the same can be set aside by proper proceedings in a court of equity. * * * We do not in any manner admit that you have any right to obtain any other award or decision from the surveyor of bridges for the county of Durham, as to the materials of which, and the manner in which, the bridge in question shall be constructed; and we also give you notice, that you are not to construe any of the acts of ourselves, our servants, or agents, as implying on our part any admission of, or acquiescence in, your right to obtain any other award or decision. * * * We hereby give you further notice, that, if you proceed to obtain such award or decision, we shall not consider ourselves bound to obey, or in any way to submit to, either the said award or decision alleged by you to have been already made by the said Ignatius Bonomi, or such other award or decision as we suppose from your said notice you are seeking to obtain."

The defendants refusing to enter into any discussion with the plaintiffs respecting the new plan, the plaintiffs'

engineer attended at the office of Mr. Bonomi, and requested him to take upon himself the burden of the reference under the act of Parliament with respect to the materials of which, and the manner in which, the bridge, indicated in and proposed by the last-mentioned plan, should be built; and accordingly, on the 20th of June, 1844, Mr. Bonomi caused a notice to be served on the plaintiffs and defendants to the effect that he, having taken upon himself the burden of such reference, appointed the 1st day of July ensuing, at twelve o'clock, at the site of the intended bridge, for proceeding upon the reference.

In reply to this notice the defendants gave notice to Mr. Bonomi that they protested against his making any fresh decision, and that they should hold all persons entering on their property with reference to any proceedings under such decision to be trespassers; and on or about the 1st of July (the day fixed for proceeding on the reference) they began to build, and subsequently completed, two substantial brick walls, one on each side of the Sherburn branch railway, in the line of the intended bridge; each of such walls being upwards of nine yards in length and eight yards in height, or about twenty feet five inches above the level of the rails of the Sherburn branch railway, and about four feet in thickness at the bottom, and two feet nine inches in thickness at the top. The building of the walls was completed about the 23rd of July.

In August, 1844, the parties received notice from Mr. Bonomi that he had made his award. By that instrument, dated the 31st of July, the arbitrator, after referring to the 21st section of stat. 6 & 7 *Vict.*, and stating the circumstances under which the matter had been referred to him, directed that the bridge should consist of a platform resting upon stone pillars or abutments, and should be constructed of such material, size, and dimensions, and in manner as thereafter described, and also as specified in the plan, sections, and elevation, thereunto annexed, signed by him, and dated the 31st July, 1844; that the pillars

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or abutments at each end of the bridge should be built close adjoining to the boundary of the Sherburn branch of the Clarence Railway, on the land of the Rev. R. H. Williamson; that the foundations of the said pillars or abutments should be laid within the clay, the masonry to consist of Ashlar stone, &c., &c.; and that they should be carried up to such a height as that no part of the under side of the soffit of the bridge might come within sixteen feet of the surface of the rails of the Sherburn branch of the Clarence Railway, &c., &c.

Soon after the publication of this award, the plaintiffs tendered to the defendants their expenses of the reference, and commenced operations; giving notice to the defendants to pull down the walls which they had built across the intended line of bridge.

The defendants refused to accept the tender or to pull down the walls, and on the 2nd of September they filed their bill against the plaintiffs and another party, praying that the plaintiffs might be restrained by injunction from making any bridge over the Sherburn branch of the Clarence Railway, at the place where the works of the plaintiffs were then carried on, and from knocking down the walls built by the defendants, &c., until it should have been ascertained under the direction and decree of this Court, whether the first award or decision of the 23rd of November, 1843, was valid or invalid, and, in the event of the same being set aside, until the same had been properly set aside.

On the 9th of September the defendants moved for an injunction according to the prayer of their bill, whereupon it was ordered that a case should be stated for the opinion of the Court of Exchequer, and that the questions in such case should be, First, whether the plaintiffs had a right in law, without the consent of the defendants, to make and construct across the defendants' railway a bridge, according to the first determination of Mr. Bonomi, upon the site and in the manner directed by that determination.

Secondly, whether, if the plaintiffs had such right, the defendants were entitled to any, and what payment or compensation for the land, or the use of the land, for that purpose, and by what means to be ascertained. Thirdly, whether the plaintiffs had a right in law, without the consent of the defendants, to make and construct a bridge across the defendants' said railway in the manner directed by the second determination of Mr. Bonomi. And the plaintiffs by their counsel consenting, and without prejudice to any question between the parties, it was declared that the plaintiffs were liable in the said suit to make to the defendants compensation in respect of such, if any, wrong, as the plaintiffs should do or cause to be done to the defendants in any of the respects in the defendants' bill mentioned, and liable also to be ordered in that suit, to take away and remove any works or erections which the Court should adjudge to have been wrongfully made or done by them. And after the Court of Exchequer should have made their certificate, such further order should be made as should be just.

After this order had been made, the plaintiffs attempted to come to some arrangement with the defendants; the latter, however, refused to make any concession, alleging, that the order of the 9th of September, was not intended to disturb their legal rights, and that, considering that a case had been directed to a court of law, it would be an unjust and also a fruitless proceeding on the part of the plaintiffs to attempt in the meantime to invade those rights.

The plaintiffs accordingly, on the 2nd of November, 1844, filed the present bill, which, after stating the foregoing facts, contained the following allegations:—That the contractors or workmen employed by the plaintiffs in the construction of the bridge have raised the stone pillars or abutments to such a height, that it is necessary and proper to throw from pillar to pillar, across the

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said Sherburn branch of the Clarence Railway, the platform, according to the award or decision in writing of Mr. Bonomi, dated the 31st of July, 1844. That the defendants have taken no steps to remove or reduce the height of the walls erected by them in the line of the intended bridge, but, on the contrary, they persist in upholding and maintaining, and still uphold and maintain the same; and by reason of the said walls exceeding the height of sixteen feet above the surface of the rails of the said Clarence Railway, unless the said walls shall be removed or taken down, or reduced in height by several feet, it is, and it will be, impossible to lay down the said platform, or to construct the said bridge in the manner prescribed and directed by the said award or decision in writing, dated the 31st of July, 1844. That, in order to carry on the said works, and preparatory to constructing the said bridge across the said railway, with the materials and in the manner prescribed and directed by said last-mentioned award or decision in writing, it is necessary that the servants and workmen of the plaintiffs, employed in the construction of the said bridge, should occasionally cross and re-cross the said Sherburn branch of the Clarence Railway, at the point or place at which the said bridge is to be built, during the progress of the works for building the same, and it is also necessary temporarily to rest upon the sides or slopes of the same Clarence Railway, on the land of the said defendants, in the line of the said intended bridge, the scaffolding required for such works; and it is also necessary to pass or throw from side to side in the said line, across the said railway, ropes and blocks, for the purpose of hauling to their proper positions the beams for constructing the said platform. That the said scaffolding may and would be erected in such a situation and manner, and at such a distance from the outside rails of the said Clarence Railway, that the said crossing of workmen and materials would take place at such times and in such a manner as not in any respect to interfere

with the traffic on the said Clarence Railway, or otherwise produce or occasion any obstruction to said defendants, their servants, workmen, or agents. That, in the latter part of the month of September, 1844, the plaintiffs received information and had reason to believe that the said defendants had made preparation for resisting, and intended by the use of their locomotive engines, or otherwise by force, to resist the operations of the plaintiffs, &c. That they still threaten and intend, &c.

The prayer of the bill was, that the defendants may be restrained by injunction from interfering with or obstructing, hindering, or preventing the plaintiffs, their servants, &c., from making and constructing the said bridge across and over the said Sherburn branch of said Clarence Railway, in the line or course prescribed by the stat. 6 & 7 *Vict.* c. lxxxii, and of the materials and in the manner specified and directed by the said decision of the surveyor of bridges for the county of Durham, dated the 31st of July, 1844, and the plan thereto annexed; and may in like manner be restrained from continuing to maintain or uphold the said walls erected by the said defendants, or any other walls, &c., whereby the plaintiffs, their agents, &c., may be prevented from constructing the said platform and from making and completing the said bridge, and from pulling down, taking up, or removing any scaffolding or other works or materials to be made, deposited, or laid down by the plaintiffs, their servants, &c., on the sides or slopes of the said Sherburn branch railway, for the purpose of making and constructing the same bridge, and from preventing or hindering the agents, servants, or workmen of the plaintiffs from passing across the said last-mentioned railway, at proper and seasonable times, during the progress of the said works, for the purposes thereof, and taking down or removing (if necessary) any such walls, &c.; the plaintiffs undertaking, during the progress of the said works, and every of them, not in any manner

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to interfere with or obstruct the traffic upon said Clarence Railway, and not in any respect to injure or damage the said Clarence Railway, or the works thereof, and undertaking to make and pay satisfaction to the defendants for any injury or damage which may be sustained by the defendants, by or from any temporary use of their land on the sides or slopes of the said railway; and that said defendants may be ordered to pay the costs of the plaintiffs of this suit.

A motion was now made for an injunction, pursuant to the prayer of the bill, founded on affidavits supporting the charges of the bill.

Mr. *Wigram* and Mr. *Hare*, for the motion, after referring to *Robinson v. Lord Byron* (a), and other cases, in which mandatory injunctions had been granted, contended that the statute 6 & 7 *Vict.* having given the plaintiffs a right to build the bridge without the consent of the defendants, the plaintiffs were entitled to all things necessary for the enjoyment of that right, and were therefore entitled to the easement of going temporarily upon the defendants' property for the purpose of constructing the bridge. In the analogous case of the grant of a power of mining, the grant would be nugatory if the grantee had not a right to go upon the land to open the mine. The authorities are collected in *Jarm. Treat. Conv.*, Vol. 4, p. 669, note (b).

Mr. *Russell* and Mr. *Collins*, for the defendants, contended that the power given to Mr. Bonomi of determining what bridge should be built across the defendants' railway was exhausted when he made his first award; and that, as that award was invalid, the plaintiffs had lost their right, if they ever had any, of crossing the defendants' railway. They also relied on other arguments which are referred to in the judgment of the Court.

(a) 1 Bro. C. C. 588.

(b) Mr. Sweet's Ed.

The defendants declined giving any undertaking to satisfy all intermediate damage arising to the plaintiffs from the delay of their works until the legal questions should be determined.

The VICE-CHANCELLOR.—The case which, in the suit between the present defendants as plaintiffs and the present plaintiffs as defendants, I directed during the last vacation, has not, it appears, been yet argued or even prepared, though, with a view to facilitate the disposal of it during Michaelmas Term, I stated, in the vacation, to the counsel and solicitors, my willingness to settle it myself, without the aid of the Master's office. I do not doubt that the case might have been settled and argued before the present time had either party so wished. The actual position of that matter, and the undertaking into which, in that suit, the plaintiffs in this suit have entered, may be thought not altogether immaterial to the present motion.

When the order for a case was made by me, and the undertaking by the present plaintiffs was given, the present suit had not been commenced; the object of which, and of the motion now before me, is, substantially, that the present plaintiffs may be permitted to erect a bridge across the railway of the defendants, agreeably to the plan secondly approved by Mr. Bonomi, the surveyor of bridges for the county of Durham. The present plaintiffs desire not to acquire the ownership, nor to become permanently either possessors or occupiers of any part of the soil belonging to the present defendants, but merely, and without impeding at any time, or interfering for a moment with, their traffic, or the free and continual passage of engines and carriages upon their railway, to be allowed to have, during the erection of the proposed bridge across it, (of which not any part is to be built or rest on their soil), such use of the soil adjoining the line of the railway, by way of temporary easement, and such power for the work-

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men employed to pass over it from side to side, also by way of temporary easement, as may be necessary for erecting the bridge with reasonable convenience; they receiving a fair compensation for the damage, if any, that may be thus done to their soil. That this damage must at the utmost be very slight is perfectly plain. That, on the other hand, the obstruction and delay occasioned by their refusal and actual course of conduct is likely to create serious prejudice and loss to the present plaintiffs cannot be doubted; in respect of which, if wrongfully caused by those conducting the affairs of the present defendants, (a corporation aggregate), the legal liability of the corporation, or its power, in point of means, to make compensation to the present plaintiffs, may not be clear; nor can it be questioned that time is of considerable consequence in this matter. Under all the circumstances to which I have referred, I consider myself bound to express, in the present position of the parties, an opinion upon the points of law that have been raised, notwithstanding the case directed in the other cause, and not yet argued.

It is, and has ever been, the contention of the present defendants, that Mr. Bonomi, in approving the plan which he first approved, acted erroneously, by exceeding his powers. To this the present plaintiffs have submitted. It being, not by their act, but by the wish and the conduct of their opponents, that Mr. Bonomi's first plan has been relinquished and abandoned. The second plan of Mr. Bonomi, whose integrity has not been questioned, has not been substantially, nor could, I think, have been, disputed by the present defendants, except on the ground that, as they contend, he was *functus officio*, by having approved the first plan, and had therefore neither jurisdiction nor power to approve the second. Is, then, this ground tenable? Whether, in the ordinary case of a private referee who makes an award, set aside by a court on grounds not impeaching his integrity, he can, without consent, (the

time limited, if any, not having expired), make another award, is a question upon which I need not give any opinion. The present is not that case; and it seems to me, upon the act in question, of 6 & 7 *Vict.*, that, as against the present defendants, who denied the validity of the first plan, it was competent to Mr. Bonomi, after that denial, (giving, as he appears to have done, sufficient notice to both parties), to proceed, at the request of the present plaintiffs, to approve of a second plan, as he did; and my impression in this particular case, having regard to the language of the act and the conduct of the present defendants, is, that the second plan is as valid and effectual against them as if the first plan had not existed, and is consequently good against them. Then, if so, are the present plaintiffs, according to a reasonable interpretation of the act and to legal principles, entitled temporarily, that is, during the work of constructing the bridge, to those easements upon the soil of the present defendants, which are necessary to enable its construction with reasonable convenience, so far as they can be exercised without obstructing or interfering, at any time or in any manner, with the traffic or free passage of engines and carriages upon the railway? I am of opinion that the present plaintiffs are so entitled. This latter point has not been proposed to be submitted to a court of law. Perhaps I should have been willing to do so had it been suggested to me in the other cause that such a point arose or might arise, but no such suggestion was made.

It has been said that the injunction now sought is wholly mandatory, and therefore proper to be refused. That injunctions in substance mandatory, though in form merely prohibitory, have been and may be granted by the Court is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit and necessary, under certain circumstances, to be exercised. Under what circumstances it should be

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exercised must be matter for judicial discretion in each several case.

It is also said, that, to assist the present plaintiffs on this motion, will be to give them possession of land in dispute pending a litigation, by evicting defendants in possession for the purpose. I think that an over-statement. The present plaintiffs claim to use or touch the defendants' soil only by way of temporary easement. A case may well be conceived in which an injunction ought, upon proper terms, to be granted interlocutorily to a plaintiff claiming a right of way over the land of a defendant denying the right and obstructing the plaintiff. Cases as to water and light may be more frequent, but differ in principle little, if at all. But it is true, that here the plaintiffs have never been in possession of the easement claimed: and whether the other facts before me, the act of Parliament, my view of its meaning, and my impression as to the law, ought, countervailing that circumstance, to induce this Court, pending the case directed to the Court of Exchequer, to interfere on the present occasion, taking care to secure, as far as may be, eventual justice to both parties, I have doubted, and as I continue to doubt, will further consider.

Dec. 13th.

The VICE-CHANCELLOR.—Upon the plaintiffs' motion, heard during the term, the defendants having declined to give an undertaking that had been suggested, I thought it right to state my opinion as to some points of law raised in this cause, notwithstanding that the case directed, in the other cause between these parties, to the Court of Exchequer had not been argued. This I did in the course of last week, reserving for further consideration the question whether, in the present position of the two causes, I could grant the plaintiffs an injunction against the defendants under such guards and qualifications as should secure the defendants against any obstruction or interruption of their traffic or

business, against serious and substantial damage, against permanent damage of any kind, and against all chance of not being fully compensated for any damage whatsoever. Viewing the matter in contest as I do, I have no hesitation in saying that I wished to find myself able to think it right that I should interpose even as the causes now stand. But I have not succeeded in persuading myself to take this step.

Considering that the plaintiffs have never been in possession (so far as that expression is applicable) of any part of the easements that they claim, that the questions in dispute are legal merely, and that the defendants deny the plaintiffs' legal right, on grounds which, though they may be, as they appear to me to be, untenable, I cannot pronounce to be merely frivolous—considering the pendency of the case directed to the Court of Exchequer, as to which neither party seems to me to have been active, and the nature of the injunction which alone could be useful to the plaintiffs, I think that I should be going to a greater extent than, as far as I am aware, the Court has hitherto gone, and, in effect, be taking what might, perhaps properly, be deemed a new step of some importance, by now interposing. Therefore, without saying that the Court ought not now to interpose, it is, I think, safer and better that the step should be taken, if at all, by the head of it. But I do not refuse this motion. I direct it to stand over; and I give leave, so far as I can give leave, to either party to apply to the *Lord Chancellor* to hear it himself, without any fresh notice, if his Lordship shall think fit.

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In consequence of these last observations an application was made to the *Lord Chancellor* on the part of the plaintiffs; when his Lordship recommended the parties to proceed to law; and on the 17th of December, 1844, an order was made in both suits that a case should be stated for the

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opinion of the Court of Exchequer upon the legal rights of the parties. It was declared by the order that the statements of fact contained in the case were to be without prejudice to any questions arising in these suits. And it was ordered that the motion in the second cause should stand over until after the certificate of the Court of Exchequer should be obtained. With liberty to either party to apply.

The questions submitted to the Court of Exchequer were as follows:—

First, whether the Junction Railway Company have a right in law, without the consent of the Clarence Railway Company, to make and construct across the Clarence Railway a bridge according to the first-mentioned award, determination, or decision of Ignatius Bonomi, dated the 23rd day of November, 1843, and the plan thereto annexed, upon the site and in the manner purporting to be authorized thereby.

Secondly, whether, if the Junction Railway Company have such right, the Clarence Railway Company are entitled to any and what payment or compensation for their land, or the use of their land, to be used for that purpose, and by what means to be ascertained.

Thirdly, whether the Junction Railway Company have a right in law, without the consent of the Clarence Railway Company, to make and construct a bridge across the Clarence Railway, according to the design and in the manner purporting to be authorized by the second award, determination, or decision of the said Ignatius Bonomi, and the plan thereto annexed.

Fourthly, whether, supposing the third question to be answered in the affirmative, and supposing the Junction Railway Company to be willing and desirous to construct the bridge mentioned in that question, at a reasonable expense and with reasonable convenience, without build-

ing upon any part of the soil of the Clarence Railway Company, and (subject as after mentioned) to be able to do so, but supposing it to be impossible for them to construct it at a reasonable expense or with reasonable convenience, unless, during and for the purpose of the work, it shall be allowed to them temporarily to place and rest scaffolding poles upon the soil of the Clarence Railway Company, (that is to say) upon the strips adjoining the line of their railway, without, however, touching the line of the Clarence Railway, and also be allowed to the workmen of the Junction Railway Company to be employed in the work to cross the line of the Clarence Railway, from time to time, from side to side—the said Clarence Railway Company are or will be entitled by law to hinder and prevent such scaffolding poles from being so placed and rested, and to hinder and prevent such workmen from crossing as aforesaid: it being understood and assumed that the Junction Railway Company, and their agents, servants, and workmen respectively, intend not to do, and will not do, any vexatious acts, or any act not necessary for erecting and completing the bridge in question, in a reasonable and proper manner; and will not prolong the work unnecessarily, and will not obstruct, interrupt, delay, or interfere with the traffic or free passage of or upon or along the line of the railway of the Clarence Railway Company, or any part thereof; and will make to the Clarence Railway Company a reasonable compensation for all such use of their soil as mentioned in this question, and will, at the end of the work, if desired by them, restore the same to its previous state.

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The Court of Exchequer, after having the case argued before them, sent their certificate, by which they negatived the first question, stated it to be unnecessary to answer the second, answered the third in the affirmative, and the fourth in the negative.

On the 26th of January, 1845, an order for an injunction

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was granted in (nearly) the terms of the prayer of the bill; with a proviso (*a*), that the injunction was not, nor was that order, to be considered as authorizing the plaintiffs to do any vexatious act, or any act not necessary for erecting and completing the bridge in a reasonable and proper manner, or to prolong the work unnecessarily, or to obstruct, interfere with, or delay the traffic or free passage of the defendants, their workmen or agents, along their line of railway, &c.

(*a*) See 10 Ves. 195.

Nov. 25th.

FILDER v. BELLINGHAM.

Purchaser who had applied to open the biddings, and upon a re-sale was outbid, allowed, under the special circumstances of the case, interest on his deposit, as well as the costs of the re-sale and of his applications to the Court.

CERTAIN real estates having been ordered to be sold in this cause, the Rev. T. W. Gilham became the purchaser; and, on the 21st of December, 1843, he, in pursuance of an order of this Court, paid into the Bank of England, to the credit of the cause, £200, as a deposit. Mr. Gilham afterwards, on behalf of the members of the family beneficially interested in the property, applied to the Court to have the biddings opened, which was accordingly done. On the re-sale he was outbid, and the biddings were advanced from £1500 to £2100; at which sum the property was disposed of.

A motion, supported by affidavit, was made on behalf of Mr. Gilham that his deposit might be repaid to him, together with interest thereon at the rate of *£4 per cent. per annum*, from the 21st of December, 1843, and that he might be allowed, out of the fund in Court, the costs, charges, and expenses incurred by him in and about the order for re-opening the biddings and the re-sale, and of the present application.

Mr. *Waley*, for the motion.

Mr. Collyer and Mr. J. Baily, for the different parties interested, offered no opposition.

The VICE-CHANCELLOR said, that, under the special circumstances of the case, he should accede to the application both with respect to the interest and the costs.

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STOOKE v. VINCENT.

Dec. 9th.

SARAH VINCENT, the wife of John Vincent, being possessed, to her separate use, of a certain sum of money which was held in trust for her, and which had been lent by the trustees to her husband on the security of his bond, made her will, and thereby gave the interest of the sum to her husband for his life, and gave the residue of her estate to Sarah, the wife of Edward Stooke, for her separate use, and appointed Sarah Stooke her executrix.

Sarah Vincent died in 1814, and her husband in 1830.

The bill was filed by Edward and Sarah Stooke against the executors of Vincent, (who were his three sons), and against the executors of the surviving trustee, stating the above facts, and praying for an account of principal and interest due upon the bond, and that the defendants, the executors of Vincent, might be decreed to pay to the plaintiff Mrs. Stooke, or to a trustee for her, what should be found due.

The time for demurring to the bill having expired, the defendants, the executors of Vincent, put in a plea whereby they stated, that, after the making of the bond, and after the death of Sarah Vincent, to wit, on the 15th day of April, 1818, the plaintiff Edward Stooke, by his certain

Plaintiff, by his bill, shews that he has no interest. Defendant (the time for demurring having expired) pleads a general release by the plaintiff. The plea is good.

Defendant pleading a release, offers to produce it: he is not bound to produce it on the mere argument of the validity of the plea.

Where, to a bill filed by husband and wife, one of several defendants filed a plea which was allowed, the Court declined, in the absence of the other defendants, to allow the plaintiffs to amend by making the husband a defendant, and

naming a next friend to the wife.

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deed or writing of release, dated the said 15th of April, 1818, (which the defendants were ready to produce as this Court should direct), did, for the valuable considerations set out in the plea, for himself and the said Sarah his wife, and their respective heirs, executors, and administrators, remise, release, and for ever discharge, the said John Vincent, his heirs, executors, and administrators, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sum and sums of money, accounts, reckonings, controversies, damages, claims, and demands whatsoever in law and in equity, which against the said John Vincent they, the said Edward Stooke and Sarah his wife, then had, or which the said Edward Stooke and Sarah his wife, and their respective heirs, executors, or administrators, thereafter could, should, or might have, for, upon, or by reason of any matter, cause, or thing whatsoever.

Mr. *Crawford*, for the plea, said, that the suit by the husband and wife was the suit of the husband, and therefore his release of all suits was properly pleaded in the present case. It might be said the husband had no interest, and that, as that circumstance appeared upon the bill, the bill was demurrable. Admitting that to be so, the plea was nevertheless good, for the husband's release was as good as his title.

Mr. *Moore*, for the bill.—The old practice in these cases was to join the husband and wife as co-plaintiffs; and there is no reason why that practice should be departed from: *Smyth v. Myers* (a). No mischief can arise to the wife from the suit being so framed, for the money is in the hands of a trustee, and the bill prays that it may be paid to a trustee. The suit, therefore, is substantially that

(a) 3 Madd. 474.

of the wife, though the husband is joined for conformity. If that be so, the plea of release by the husband is bad. Besides, the nature of the release, as applicable to this demand, does not appear on the plea. The release, as pleaded, extends to every action or suit which may be brought by the plaintiffs against the defendants, at any time and in respect of every possible matter. The defendants, therefore, are bound to produce the release in order to shew that it applies to this demand. They offer by their plea to do so. [The *Vice-Chancellor*.—If you had taken issue on the plea, and had moved for the production of the release, they might possibly have been bound to produce it; but they are not bound to do so on the mere argument of the plea. They might have pleaded the release without stating it to be in their possession. I am not aware of any proceeding in this Court analogous to craving oyer at law.]

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Upon this last point Mr. *Crawford* referred to *Campbell v. Mackay* (a).

THE VICE-CHANCELLOR.—This is the case of a bill filed by a man who has no title whatever, and the defendant, being too late to put in a demurrer, files a plea stating that the plaintiff has released. I am not prepared to say that this is a bad plea.

Mr. *Moore* then asked leave to amend the bill by making the husband a defendant, and naming a next friend to the wife; on giving security for the costs already incurred.

THE VICE-CHANCELLOR said, that he should be willing to grant this liberty to amend, but the circumstance of there being other defendants prevented him. They were

(a) 1 Myl. & Cr. 603.

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not to be deprived of their security for costs. Any liberty to amend could only be given in a proceeding to which the defendants were parties. He would, however, allow the plea, without prejudice to any application that might be made by the plaintiffs to amend the bill.

ALLOW the plea, without prejudice to any application that the plaintiffs may be advised to make to amend the bill. And the defendants pleading, consenting and undertaking that the plaintiffs' solicitor or agent shall be at liberty to inspect the deed of release at the office of the solicitor of the defendants pleading, and to take a copy thereof, at the plaintiffs expense, at any reasonable time before the 25th inst., let the plaintiffs pay the costs of this plea.



Dec. 9th.

ADAMS v. PAYNTER.

Judgment creditors, whose judgments have been entered up subsequently to the plaintiff's security, must be made parties to a bill of foreclosure: it is not sufficient that they should be served with copies of the bill under the 23rd of the Orders of August, 1841.

Semble, however, that this rule may be relaxed in cases where the judgment creditors are inconveniently numerous.

THE defendant Paynter, by a deed dated the 25th of March, 1834, mortgaged an estate to Parson for a term of years. That mortgage was afterwards assigned to the plaintiffs John Adams and Edward Cocker, by a deed dated the 13th of October, 1838; a further sum being then advanced to the mortgagor on the security of the premises. Paynter afterwards conveyed the mortgaged estate to Allen, in trust for sale &c. After the date of the assignment, about six judgments were entered up against Paynter, and duly registered as required by the 1 & 2 Vict. c. 110.

The bill, which prayed a foreclosure, was filed against Allen and Paynter. The judgment creditors were not formally made parties, but the bill prayed that, on being served with a copy of the bill, they might be bound by all the proceedings in the suit. They were served accordingly, and a memorandum of service entered; and no appearance was entered by them under the 26th Order of August, 1841.

Upon the cause coming on for hearing—

Mr. *Russell* and Mr. *Chapman*, for the defendant Allen, insisted upon an objection which had been taken by that defendant's answer, that the judgment creditors had not been made parties to the suit.

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Mr. *Simpkinson* and Mr. *Miller*, for the plaintiffs.—If these judgment creditors must be made parties in the ordinary manner, there is reason to fear that the whole estate will be swallowed up in costs. The original mortgage having been made before the stat. 1 & 2 *Vict.* c. 110, the case must be treated as if that act were not in existence. [The *Vice-Chancellor*.—No objection is taken under that act.] If that act is out of the question, the judgment creditor, having no lien on the land, (in the proper acceptation of the word “lien”), is not a necessary party: *Neate v. Duke of Marlborough* (a). At all events, to avoid unnecessary expense, it is competent to the plaintiff, in a foreclosure suit, to dispense with judgment creditors where they are numerous. That seems clear from the observations of Lord *Alvanley*, in the *Bishop of Winchester v. Beavor* (b). The cases of *Draper v. Jennings* (c), *Burgh v. Francis* (d), *Brace v. Duchess of Marlborough* (e), and *Rose v. Page* (f), are also in point. Besides, these incumbrancers, upon whom copies of the bill were served under the 23rd Order of August, 1841, might, if they had pleased, have taken advantage of the 26th Order and insisted upon being made defendants in the regular way. As they have not done so, the objection comes too late.

The VICE-CHANCELLOR.—This is the case of a bill filed

(a) 3 M. & Cr. 407, 417.

(b) 3 Ves. 317.

(c) 2 Vern. 518.

(d) 3 Swanst. 536, n.

(e) 2 P. W. 491.

(f) 2 Sim. 471.

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by a first mortgagee to foreclose. It appears upon the face of the bill, or is otherwise admitted, that there is a puisne mortgagee, or incumbrancer of that nature, who is a party to the bill, and that there are judgment creditors of the mortgagor intervening between the first and second mortgagee. Ever since I have known any thing of this Court, such intervening incumbrancers have always been considered necessary parties to a bill of foreclosure. I should act against universally recognised and established rules if I were to suggest a doubt upon the subject. Cases of judgments confessed *pendente lite*, cases of fraud, cases of parties inconveniently numerous, may possibly exist in such a manner as to form an exception to the rule: cases of judgments *pendente lite* generally do. But this is not that description of case. It is said that these persons are parties. If so, the bill is in this situation: it is brought to a hearing against several defendants, some of whom have not answered. Generally such a bill, unless process has been exhausted, cannot be heard. But it is said, that the 23rd Order of August, 1841, supersedes the necessity of an answer by these parties. [His Honor here read the 23rd Order.] The very grounds of the reason upon which the judgment creditors in question are necessary parties to a suit for foreclosure shew unquestionably, as it appears to me, that direct relief is prayed against them. I think that the case is not within that Order.

The bill is such, that these parties not having answered, and not being in contempt, the cause cannot now be heard.

It was also objected, on the part of the defendant, Allen, that William Bowen had not been made a party to the suit.

Where a marriage settlement contained the usual power to appoint new

By the marriage settlement of Mr. and Mrs. Lloyd, dated in March, 1822, it was declared that the trustees of the settlement, William Bowen, William Richards, and

John Adams, should invest the sum of £2000 on government or real security, and stand possessed thereof, for the benefit of Mr. and Mrs. Lloyd and their children. The settlement contained the following power for the appointment of new trustees:—"Provided &c. that, if any or either of them, the said W. Bowen, W. Richards, and J. Adams, or any future trustee or trustees shall happen to die, or be desirous to be discharged from, or neglect or refuse to act in the trusts hereby created, then it shall be lawful for the said G. Lloyd, and Marianne his wife, to nominate and appoint any other person or persons to be a trustee or trustees for the purposes aforesaid, in the place or stead of the said W. Bowen, W. Richards, and J. Adams, or either of them, or any future trustees or trustee, who shall happen to die, or be desirous to be discharged from, or neglect or refuse to act in the trusts aforesaid; and that, upon such nomination and appointment, the trustees or trustee for the time being shall convey, assign, surrender, and transfer the trust estates, and all trust-monies, so that the same shall be vested in the joint names of the surviving or continuing trustees or trustee, and of such person or persons as shall be appointed to be a trustee or trustees, as aforesaid, on the same trusts."

By a memorandum, dated the 26th of September, 1838, signed by W. Bowen, and indorsed on the settlement, after stating that William Bowen was desirous of being discharged from the trusts of the said indenture, and that G. Lloyd, and Marianne his wife, had assented thereto, the said William Bowen did, under the provisions in that behalf contained, with the consent and approbation of the said G. Lloyd and Marianne his wife, assign, renounce, transfer, and yield up to the said W. Richards and J. Adams the trust-monies, funds, securities, powers, and authorities, to the end that the trusts of the indenture might be managed and carried into execution by W. Richards and J. Adams, and the survivor of them, and the

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trustees, and one of the trustees relinquished his trust, and a memorandum to that effect was indorsed on the settlement, but no new trustee was appointed in his room, and after his retirement the remaining trustees lent out the trust-money on mortgage:—*Held*, that the retired trustee was a necessary party to a bill of foreclosure of the mortgaged estate.

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executors, and administrators, and assigns of such survivor, or such other the trustees or trustee for the time being, as by virtue of the powers in the said settlement might be appointed.

By an indenture, dated the 13th of October, 1838, which has been already mentioned, the estate in question was mortgaged to William Richards, (in whose room the defendant Cocker was afterwards appointed a trustee), and John Adams, to secure £2000, being the amount of the trust-monies.

Mr. *Russell* and Mr. *Chapman*, for the defendant Allen, objected that Bowen had not been duly discharged from being a trustee, and was therefore a necessary party to the suit. In the event of the defendant Allen redeeming the plaintiffs, they could not alone give a discharge for the purchase-money.

Mr. *Simpkinson* and Mr. *Miller* submitted that, as the mortgage was made to Adams and Cocker alone, and Bowen had ceased to act as a trustee, it was not necessary to make Bowen a party.

The VICE-CHANCELLOR.—Can a trustee who has once accepted be free from the trust except upon the substitution of some one else in his place? I think that Bowen ought to be a party.

1844.

STEELE v. MAUNDER (a).

Dec. 18th.

THIS was a foreclosure suit. The mortgage was made in 1825. The mortgagor, by the settlement made on his marriage in 1827, settled the mortgaged estate upon his wife and the issue of the marriage, who alone were to take any benefit under the settlement. The mortgagor subsequently became insolvent. The mortgagee filed his bill to foreclose, omitting to make the assignee of the mortgagor under the Insolvent Act a party. An objection being taken by the trustees of the settlement in their answer, that the assignee ought to have been made a party, the suit was set down for hearing under the 39th Order of August, 1841, upon that objection.

Mortgagor upon his marriage settled the mortgaged estate upon his intended wife and the issue of the marriage, and afterwards became insolvent:—*Held*, that his assignee was not a necessary party to a bill to foreclose the estate.

Mr. *Paton* appeared for the trustees.

Mr. *Fooks*, for the plaintiff.

The VICE-CHANCELLOR was of opinion, that, upon the statements in the pleadings, the objection must be overruled, but without prejudice to any question in the cause, and reserving the costs.

(a) *Ex relatione*.

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LLOYD v. WARING.

The provision in the stat. 6 Geo. 4, c. 16, against the abatement of suit by the death or removal of assignees extended to the case of official assignees.

MOTION for liberty to substitute the name of a new official assignee, as plaintiff in the suit, in the room of an official assignee who had been removed from the district in which the bankruptcy had taken place to a new district.

By the stat. 6 Geo. 4, c. 16, s. 67, it is enacted, that whenever an assignee shall die, or a new assignee shall be chosen, no action or suit shall be thereby abated, but the Court in which any action or suit is depending may, upon the suggestion of such death or removal, and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former.

The stat. 1 & 2 Will. 4, c. 56, s. 22, creates the office of official assignee, and enacts, that an official assignee shall, in all cases, be an assignee of the bankrupt's estate and effects, together with the assignees to be chosen by the creditors; but that act does not contain any provision against the abatement of an action or suit by the death or abatement of an official assignee.

The 5 & 6 Vict. c. 122, s. 48, extends the appointment of official assignees to country fiats.

Mr. *Dean*, for the motion, said, that an application of the same nature had been made to the *Master of the Rolls* in the case of *Nouaille v. Flight (a)*, where an official assignee had died, to which His Lordship had acceded.

The VICE-CHANCELLOR granted the motion.

(a) M. R. 26th April, 1844.

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BAYLIES v. BAYLIES.

Dec. 18th.

SIMON BAYLIES, being seised of a freehold, copyhold, and leasehold estate, consisting of a messuage or dwelling-house, farm, and lands, called the Leys, which he occupied and managed until the time of his death; and being possessed of considerable personal estate, made his will, dated the 23rd June, 1844, and thereby gave and bequeathed to his brother John Baylies, and his nephew John Boulton, their executors and administrators, all and singular his ready monies, securities for money, farming stock, growing crops, and effects, and all other his personal estate whatsoever and wheresoever, except his leasehold estate thereafter bequeathed, upon trust that they, or the survivor of them, his executors or administrators, should, as soon as conveniently might be after his decease, sell, call in, and collect, and convert the same into money, and stand possessed of the monies arising from such sale, collection, and conversion, in trust, in the first place, to pay and discharge all his just debts, funeral and testamentary charges and expenses, chief rents, and land-tax, and also the costs and expenses of renewing such of the lives as had then, or at the time of his decease, should have fallen in and become renewable upon his copyhold and leasehold estate in the parish of Alvechurch, or either of them, and then to retain thereout the sum of £10 for draining tiles, to be used by them, his said trustees, where they thought proper, upon and about his said real estate, and after the several payments and deductions aforesaid, then upon trust, that they, his said trustees, should retain, pay, and divide the whole of the said trust funds arising from his said personal estate, unto and equally between his wife Elizabeth Parker Baylies, the said John Baylies, the testator's sister Elizabeth Boulton, widow, and Hannah Wilson, wife of John Wilson, share and share alike, as tenants in common,

Upon the construction of a devise of real property:—

Held, that an equitable tenant for life was entitled to the personal enjoyment of the property, upon giving security for the due fulfilment of the objects of testator's will.

In order to give effect to the claim of the tenant for life, the Court (in contravention of a previous letting by the trustees of the will to a person who had notice of the trusts) granted a receiver of the property, with a direction to let it to the tenant for life upon the terms of giving such security.

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and not as joint tenants. And the testator gave, devised, and bequeathed unto John Baylies and John Boulton, their heirs, executors, administrators, and assigns, all and singular his freehold, copyhold, and leasehold estates situate in the said parish of Alvechurch, or elsewhere, and all other his real estate, to hold the same unto and to the use of them the said John Baylies and John Boulton, their heirs, executors, administrators, and assigns, according to the respective natures and qualities of such estates, respectively, upon trust that they or the survivor of them, his heirs, executors, administrators, or assigns, should let and set, and receive, and take the yearly rents, issues, and profits arising therefrom, as and when the same should become due and thereout, in the first place, from time to time, so often as any life or lives should (after his decease) drop or fall in, pay and discharge the costs of renewal of or of putting any new or other life or lives in the place or stead of such life or lives so dropped or fallen in, as aforesaid; and, in the next place, should pay and discharge all costs and expenses of keeping the said hereditaments and premises in good and tenantable repair and condition, and all annual outgoings thereout; and after the several payments aforesaid, then upon trust to pay the remainder of the said rents, issues, and profits, as and when the same should become due and be received, unto his said wife, the said Elizabeth Parker Baylies, for and during the term of her natural life, for her own sole and separate use, whether married or not, it being his intention that the said rents, issues, and profits should be a maintenance for her in all events; and he declared that the same should not be pledged or anticipated, or be in anywise subject to the debts, control, or engagements of any husband she might thereafter marry; and from and after the decease of his said wife, the said Elizabeth Parker Baylies, then upon trust that they, his said trustees, or the survivor of them, his heirs, executors, administrators, or assigns, should,

either by sale or mortgage of all or any part of his said freehold, copyhold, and leasehold estate, or by such other ways and means as they or he should think best, levy, raise, and take up, at interest, the principal sum of £1000, and stand possessed thereof, in trust for, and to pay the same unto, such person or persons, for such estate and interest, and in such manner and form, as she, his said wife, should, by any deed, or by her last will and testament, to be by her respectively executed and attested, direct, appoint, give, or bequeath the same, and which deed or will, notwithstanding she might be under coverture, she might and was thereby empowered to make; and, in default of any such direction, appointment, gift, or bequest, then in trust for her next of kin, according to the Statute of Distributions; and subject and charged and chargeable with the payment of the said principal sum of £1000, and to the powers and remedies thereby given for raising the same, then upon trust that they, his said trustees, or the survivor of them, &c., should convey, assign, surrender, and assure all his said freehold, copyhold, and leasehold estate unto and to the use of, or in trust for the said John Boulton and the testator's nephew Richard Boulton, their heirs, executors, administrators, and assigns, equally as tenants in common, and not as joint tenants, to whom he thereby devised and bequeathed the same accordingly. And the testator directed, that in case either of his trustees thereinbefore named, or any future trustee or trustees should die, or become desirous to be discharged from, or incapable to act in, the trusts of his will, new trustees, should be appointed in the manner in the will mentioned, with the consent of the testator's wife, so that there might always be two trustees of the will. The testator then, after providing for the sufficiency of the trustees' receipts, and for their indemnity, in the usual manner, appointed them his executors.

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The testator died on the 24th of June, 1844, and his will was proved by the executors in November following.

The bill was filed by the testator's widow against the executors, and the other legatees and devisee named in the will, (the latter defendants being served with copies of the bill), and (by amendment) against one Richard Burman. After stating that the defendants John Baylies and John Boulton had proved the will, taken possession of the testator's personal estate, paid his debts, and retained or ought to have retained a considerable residue in their hands, the bill alleged that they had taken possession of the title-deeds of the testator's freehold, copyhold, and leasehold estates, so as aforesaid devised to them, and ought either to have permitted the plaintiff, who was entitled during her lifetime, to receive the rents and profits thereof under the trusts of the will, subject to such payments thereout as in the said will mentioned, to occupy the said estates at a fair rent and on giving proper security, or else ought to have let the estates to proper and responsible tenants at the best rent that could be procured; but that instead of so doing, the defendants John Baylies and John Boulton formed a scheme of letting the farm and lands, called the Leys, to the defendant Richard Burman, a relative of theirs, at a rent far below the real value of the property, although Burman was not a responsible or eligible tenant, and although they were well aware, as the fact was, and as the plaintiff had informed them, that she, with her said late husband, had been in the occupation of the farm for twenty years, and up to the time of her husband's decease, and had for all that period dwelt in the dwelling-house, and was anxious to remain in possession of the farm, and would have given full and sufficient security for keeping the same in proper repair and for payment of the fines, or would have become and had offered to become tenant thereof at the full annual value of the premises; and, fur-

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ther, that the defendants, in pursuance of such plan or scheme, concealed from all the persons in the neighbourhood who would have been likely to offer to become tenants, their intention of turning the plaintiff out of possession, and of letting the farm to a stranger, and that they privately entered into a negotiation with the defendant Burman for letting to him the farm and lands at the inadequate rent of £158 *per annum*. The bill also contained a charge that the defendant John Baylies had, inconsistently with his duty as trustee, turned his own cattle, and allowed other persons to turn their cattle on the farm while in the plaintiff's possession.

The bill prayed that the will might be established &c., and, if necessary and proper in this suit, that accounts might be taken of the personal estate and of the rents of the real estate of the testator possessed by the defendants, the executors, the plaintiff being willing to be charged with an occupation rent for the farm during the time of her occupation; and, if necessary and proper in this suit, that the testator's assets might be administered &c. And in case it should appear that any agreement for letting the farm had been entered into between the executors and Burman that the same might be declared void; and that the plaintiff or some proper person, might be admitted a tenant upon giving proper security for repairs and payment of renewal fines, &c. And that in the meantime the defendants John Baylies and John Boulton might be restrained by injunction from letting the aforesaid farm and lands to Burman at the aforesaid rent of £158, or from otherwise letting, setting, or disposing of the said estates, without the direction or until the further order of the Court, and also from permitting Burman, his labourers, agents, or workmen to enter into or to continue in the possession of the farm and lands called the Leys, and from permitting any person other than the plaintiff, or such other person or

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persons as should, under the order of the Court, become tenant or tenants of the testator's estate, to enter into or continue in such possession, or to turn cattle into or upon the said farm and lands or any part thereof; and that Burman, his labourers, agents, and workmen might be in like manner restrained from entering into and continuing in such possession, and from turning cattle into or upon the said farm and lands, &c., and for a receiver.

A motion was now made for an injunction, pursuant to the prayer of the bill. Amongst the affidavits in support of the charges of the bill were those of two persons of good property, who had offered to give £200 *per annum* for the farm.

In opposition to the motion, the trustees, by their affidavits, stated, that in July or August, 1844, having previously informed the plaintiff of their intention so to do, they employed Thomas Holyoake, a surveyor of experience, to make a valuation of the testator's messuage, farm, and lands, for the purpose of letting them. That, on the 29th August, Holyoake valued the property at the sum of £158 *per annum*, exclusive of tithes, which he valued at £28. That, after the testator's death, several persons (who were named) were informed by the defendants of their intention to let the property, and that some of such persons applied to become tenants. That about a month after their applications were made, viz. on the 24th of September, the deponents agreed with Burman to let him the testator's messuage, farm, and lands at Holyoake's valuation, viz. £158 *per annum*, exclusive of the tithes, valued at £28 *per annum*, making together £186, on condition that the due payment of the rents and fulfilment of the covenants should be guaranteed by John Holbecke, and that a proper agreement should, when prepared, be executed. That a day or two afterwards, John Boulton informed the plaintiff that he and his co-trustee had agreed to let the farm to Burman

at Holyoake's valuation, and to take the security of John Holbecke for the payment of rent and performance of covenants; upon which the plaintiff only observed—"I think you should not have let it to a relative." That Burman was not a relative of either of the deponents. That previously to the 29th of September, the plaintiff permitted the deponents peaceably to carry on and manage the farm, &c., and to turn cattle thereon when they thought necessary, and that she appeared to be making arrangements for quitting the premises, and had applied to the deponents for the refusal of a house in Alvechurch. That, on the 30th of September, John Boulton delivered to the plaintiff a copy of Holyoake's valuation, and on the same day, Burman, by the direction of the deponents, took possession of the farm, except the dwelling-house and garden, which were still occupied by the plaintiff. That it was not until the 7th of October that the plaintiff gave notice to the deponents that she was willing to take the farm upon equally advantageous terms as any other person.

According to the affidavit of the defendant John Baylies, the property of Burman consisted of about £400 cash, his farming stock and household furniture, and a reversionary interest in one-tenth of forty acres of freehold land.

The following agreement, signed by the defendants, the trustees, and Burman, was produced in support of their case:—"Memorandum of agreement made this 24th day of September, 1844. The executors of the late Mr. Simon Baylies agreed to let, and Richard Burman agrees to take, the Leys farm and house, outbuildings, &c., thereon, containing 107 a. 1 r. 0 p. together, be the same more or less. Whereas the said executors have ordered their solicitor, Mr. Browning, to prepare an agreement according to the usual form of agreements, and such covenants and conditions to be inserted therein as they the said executors have given him instructions, for the good and husbandlike management of the said farm, [which agreement] the said

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Richard Burman does hereby agree to execute such agreement so soon as it is complete. As witness our hand," &c.

The plaintiff, by her counter-affidavit, stated that no notice was ever taken by the defendants, the trustees, of the applications of those persons who had offered to become tenants of the farm, but that she believed that they were all more eligible than Burman. She admitted that, on the 16th of September, John Boulton had informed her that the farm had been let to Burman at Holyoake's valuation, but she stated that he did not then tell her what rent Burman was to give, and that she never was informed upon that point until the 30th of September when the copy of Holyoake's valuation was delivered to her. That this accounted for her not having given notice of her desire to take the farm until the 7th of October. That her apparent acquiescence with respect to the cattle, &c., arose from her belief that the trustees were acting in execution of the trusts of the will. She admitted that she was in error in calling Burman a relative of the trustees, the fact being, that his wife was the daughter of Holbecke, who was the first cousin of Elizabeth Boulton, the mother of the defendant John Boulton.

It was stated at the bar, and not contradicted, that a few days after the bill was filed, an action of ejectment was brought against the widow on the joint demise of the trustees and Burman.

Mr. *Russell* and Mr. *De Gea*, for the motion.

Mr. *Wigram* and Mr. *Rogers*, for the defendants, the trustees, contended that it was not competent to the widow, although equitable tenant for life, to insist upon having the personal occupation of the property. Upon the true construction of the will, the trustees were to have

a discretionary power of managing it: *Tidd v. Lister* (a). The trustees having the legal estate, had demised the property at a fair rent to Burman, and they had a right to do so.

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Mr. *Cooper*, for the defendant Burman.—There is no evidence that this defendant had notice of the will. [The *Vice-Chancellor*.—I shall assume that he had notice; at least unless he swears the contrary.] Assuming that he was aware of the trusts of the will, can he become party to anything in the nature of a breach of trust by accepting a lease of this farm as a tenant from year to year? It is clear, on the face of the will, that the trustees were to have the active management of the property. In the very commencement of it there is a direction that portions of the personal estate shall be applied by them to the benefit and improvement of this property in a particular manner. There are, no doubt, cases where, although the trustees have a discretion as to the management of the property, yet the *cestui que trust* has an option whether he shall occupy it. But there is no particular ground for allowing that option here.

The *Vice-Chancellor*, in the course of the argument, referred, upon the construction of the will, to the case of *Blake v. Bunbury* (b); intimating an opinion, that, in the present case, it would be consistent with the intentions of the testator to allow the widow to have the personal enjoyment of the property for her life, upon giving the proper security. Upon the question of security his Honor referred to *Jenkins v. Milford* (c).

Mr. *Russell*, in reply.

The VICE-CHANCELLOR.—The only doubt which I have

(a) 5 Madd. 429.

(b) 1 Ves. J. 514.

(c) 1 J. & W. 629.

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had in this case is, as to the form in which relief ought to be granted upon the present motion. As to the merits of the case I think there is no difficulty.

I will assume for the present purpose, without deciding the point, that the trustees had the power, legally and equitably, of letting the farm in question without the consent of the widow. If they had that power, it was necessary that they should exercise it without forgetting their position as trustees—without forgetting that they had the rights and interests of others under their care. Not relying particularly upon *Mortlock v. Buller* (a), *Ord v. Noel* (b), or other cases of mere specific performance, I apprehend it to be clear in this Court, that contracts and dealings of trustees, with respect to trust property, are open to many considerations which do not belong to contracts and dealings of men dealing with property of their own, but very especially in cases where they are dealing with those who have notice that they are trustees. In the present case, I consider that Burman, when he dealt with Baylies and Boulton, had notice that they were acting under this will as trustees of it.

Considering the parties in this position, has there been a letting which, assuming the true construction of the will to be such as I have stated, it is possible for this Court to recognise?

A written contract is entered into between the parties, of a particular description. Neither term nor rent, neither the commencement nor the end of the tenancy, nor the conditions upon which the farm was to be let, are mentioned; and this is said to be a letting by trustees. [His Honor here read the memorandum. See *ante*, p. 543.]

It cannot be maintained that this alone is a letting; but it is said that the rent and the term only are not in writing. If so, there is this difficulty in the agree-

(a) 10 Ves. 292.

(b) 5 Madd. 438.

ment, that it is partly in writing and partly by word of mouth. That such an agreement may not exist in a case not within the Statute of Frauds, I will not say. But it is at least a matter of some difficulty—some embarrassment—when parties deal by means of agreements of that description. Assuming, however, that this was proper, it is perfectly plain that the agreement was to be afterwards put completely into writing; it was not to remain oral. The trustees had that degree of prudence; and the least to be expected was, that, before the tenant was in possession, the terms should be in writing. But he was let into possession without the terms being reduced to writing, and, he being in possession, they were left to deal with him as they could.

I am disposed to think that, in this case, (without regard to the character of trustee sustained by one of the parties), there was no letting at all. But, even if there was that which, in one view of the case, might be deemed a letting, I think that, as against trustees and a party having notice of the trust, it would be discreditable to a court of equity to treat it as a serious question, whether such a transaction as this ought to stand.

The question, then, is, whether the plaintiff is entitled to the possession of this property for her life. Upon a just interpretation of the will, I think that, giving security for the due performance of the objects of the will, and for dealing with the property in a reasonable and right manner, she ought not to be disturbed in the possession. There may, however, be some difficulty in point of form; not that a mandatory injunction is not within the powers of this Court; but delicacy and caution are required in issuing it. Considering the situation in which this property is placed, and that a receiver is prayed by the bill, I think that the mode of arriving at substantial justice,

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without being impeded unnecessarily by form, will be (the plaintiff consenting) to—

REFER it to the Master to appoint one or more proper person or persons to be, without salary, a receiver or receivers of the freehold, copyhold, and leasehold, (giving recognizances in the usual manner); and if the Master shall approve of any person or persons to be proposed by the plaintiff, let such person or persons be appointed by the Master in preference, and let possession of the farm be delivered to such person or persons when appointed. Let the plaintiff give such security as shall be approved by the Master for the payment and discharge of the costs of renewals, and of putting in any new or other life or lives, as in the will mentioned, and for payment and discharge of all costs and expenses of keeping the property in good and tenantable repair and condition, and all annual and other out-goings, until her death or further order. Let such receiver or receivers give the plaintiff the option of being the tenant of the property; reserving to such receiver or receivers power to inspect the state and condition of the property. Till the appointment of a receiver, the possession of the property to remain as it is. The order to be without prejudice to the question, whether Burman is or is not entitled to receive any payment or compensation, and, if any, from whom.

The VICE-CHANCELLOR afterwards said, that he was of opinion that the evidence did not establish that the plaintiff sanctioned the conduct of the trustees. In order to arrive at that conclusion, he should have required much stronger evidence that she understood her rights and meant to bind them.

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Dec. 21st.

ASHBY v. ASHBY.

EDWARD ASHBY, late of Medbourn, in the county of Leicester, by his will, dated the 4th May, 1811, gave as follows:—"All that my messuage or tenement, with the outbuildings and appurtenances to the same belonging, situate, and being in Medbourn aforesaid, and now in my own occupation, and all my closes, open fields, lands, commons, and real estate in Medbourn aforesaid whatsoever, with the appurtenances, and also my moiety or half part of a close of pasture or ground inclosed in Halloughton, in the said county of Leicester, the whole of which close contains three-and-a-half acres, or thereabouts, I give to my affectionate wife, Sarah Ashby, for and during the term of her natural life; and, subject thereto, I give and devise my said messuage or tenement, buildings, and appurtenances to the same belonging, closes, open fields, lands, commons, and all my real estate in Medbourn aforesaid, and also my moiety or one-half part of the closes or ground inclosed, with the appurtenances, situate in Halloughton aforesaid, unto my eldest son, William Ashby, and to his heirs and assigns for ever, but charged and chargeable, nevertheless, with the payment of the legacies hereinafter mentioned to my two sons, Thomas and Edward, and my daughter Elizabeth. Also, I give to my said son, William Ashby, my silver half-pint cup, and desire my wife will give to my daughter Elizabeth two silver table-spoons. I give to my said two sons, Thomas Ashby and Edward Ashby, the sum of £100 a-piece, and to my daughter Elizabeth, the wife of Edward Palmer, the sum of £80, which said several legacies I will and direct shall be paid to my two sons, Thomas and Edward, and my daughter Elizabeth, at the end of twelve months after the decease of my said wife, by my said son, William Ashby, but without any interest for the same; and I hereby charge my messuage, lands, and

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real estates in Medbourn and Halloughton aforesaid with the payment of the said legacies to my said two sons and daughter accordingly. And, if any or either of them, my said two sons, Thomas and Edward, and my said daughter Elizabeth, shall happen to die before his, her, or their said legacy or legacies shall become payable by this my will, leaving one or more child or children, I give the legacy or legacies of him, her, or them so dying, unto his, her, or their children, equally to be divided between and amongst such children, if more than one, share and share alike; but, in case either of them, my said sons, Thomas and Edward, or my daughter Elizabeth, shall depart this life before his, her, or their said legacy or legacies shall become payable, and without leaving any child or children living, I give the legacy of him, her, or them so dying unto the survivors or survivor of them, my said two sons and daughter, equally to be divided between such survivors, share and share alike. And all my household goods and household furniture, ready money, and securities for money, horses, cows, sheep, and other cattle, and all other my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, not by me before disposed of, (after and subject to the payment of my just debts and funeral expenses, and the charges and expenses of proving this my will), I give and bequeath unto my said wife, Sarah Ashby, and my said son, William Ashby, equally to be divided between them, share and share alike, and to their executors and administrators, to and for his, her, or their own use and uses." The testator appointed his wife, Sarah Ashby, and his eldest son, William Ashby, joint executrix and executor of his will.

Upon the death of the testator, his will was duly proved by his representatives.

Sarah Ashby entered into possession of the real estate devised to her for life, and continued in possession until her decease, which took place on the 2nd October, 1827.

On her death, William Ashby entered into possession of the premises, and died intestate in November, 1829.

The bill was filed by Thomas Ashby and Elizabeth Palmer, two of the legatees named in the testator's will, (Thomas Ashby being also administrator *de bonis non* of the testator, and both plaintiffs being the legal personal representatives of Sarah Ashby, and the plaintiff Elizabeth Palmer having survived her husband), against the dowress, and infant heir-at-law of William Ashby, and other persons interested in the real estate devised by the testator, praying that the will might be established, &c., and that the legacies might be raised by a sale or mortgage of the devised estate.

The first question was, whether the real estate was charged by the will with payment of the legacies in exoneration of the personalty.

Mr. Heathfield, for the plaintiff.

Mr. Renshaw, for the defendants, except the heir-at-law of William Ashby.—The circumstance that the real estate is charged with the legacies after the death of the testator's wife, is not sufficient to shew that the real estate alone was to be charged. It must be shewn clearly that the personalty was not to be charged. William Ashby, the devisee in remainder of the real estate, was not only an executor, but legatee of a moiety, of the residuary personal estate. The gift of the residue comprises all the testator's personal estate, "not before by me disposed of." Part, therefore, must have been disposed of in payment of legacies, unless those words are to be referred only to the silver cup and spoons.

Mr. Kinglake, for the remaining defendant.

THE VICE-CHANCELLOR.—The question is, whether there

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is an intention apparent in this will, that the three legacies given to the testator's two sons, Thomas and Edward Ashby, and his daughter Elizabeth Palmer, should be paid out of the real estate alone. He gives his real estate to his wife for life; subject to that, he gives his real estate to his eldest son, William Ashby, in fee, but "charged and chargeable, nevertheless, with the payment of the legacies hereinafter mentioned to my two sons, Thomas and Edward Ashby, and my daughter Elizabeth." Now, it may be, that, had the will ended here, the land would only have been an auxiliary fund for payment of these legacies; but the testator goes on:—"Also, I give to my said son, William Ashby, my silver half-pint cup, and desire my wife will give to my daughter Elizabeth two silver table-spoons." It occurred to me, at first, that this direction, that the wife should give the spoons, (considering that the personal estate is given generally to the wife and eldest son), might have the effect of neutralizing the observations which I am about to make as to the eldest son paying the legacies. But I do not think that it ought; the probability is, that the testator had more spoons than two, and he might wish to give the wife the power of selecting those which the daughter was to take. That direction does not, I think, vary the inference as to the testator's intention to be collected from other parts of the will. He then gives the three legacies; which are given in the common form of pecuniary legacies, but are to be paid, after the death of his wife, "by my said son William Ashby," to whom he has given the real estate after the death of his wife. Now, I do not say that that alone is decisive upon the question, but it is very strong. Then, after charging the legacies on the real estate, and giving certain directions respecting them, he concludes his will thus:—"All my household goods and household furniture, ready money, and securities for money, horses, cows, sheep, and other cattle, and all other my personal estate and effects what-

soever and wheresoever, and of what nature or kind soever, not by me before disposed of, after and subject to the payment of my just debts and funeral expenses, and the charges and expenses of proving this my will," not mentioning the legacies, "I give and bequeath unto my said wife, Sarah Ashby, and my said son, William Ashby, equally;" William alone being the person by whom the legacies were before directed to be paid. Upon the whole, I think that this particular will, taken altogether, does shew that the testator intended these three legacies to be charged upon his real estate only.

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Another question was, whether the plaintiff Elizabeth Palmer was precluded from claiming her legacy, or any part of it, under the following circumstances:—

By an indenture dated the 11th of October, 1826, and made between Edward Palmer, the late husband of the plaintiff Elizabeth Palmer, and the plaintiff Elizabeth Palmer, of the one part, and Susanna Clarke, widow, of the other part, Edward Palmer and Elizabeth Palmer assigned the legacy of £80, given by the will to the plaintiff Elizabeth Palmer, to Susanna Clarke by way of mortgage for securing the sum of £80 and interest. Susanna Clarke, afterwards, in consideration of natural love and affection, absolutely assigned the legacy or sum of £80 and interest, and the benefit of the mortgage, to Reuben Clarke, her grandson. Edward Palmer survived the testator's widow, Sarah Ashby, more than twelve months, but took no steps to reduce the property into possession. Reuben Clarke, who was a defendant in the present suit, claimed the benefit of the assignment.

Husband assigns his wife's reversionary *chose en action* to a particular assignee for value. He survives the person upon whose life the reversion depends, but dies without actually reducing the property into possession. The assignment is void against the surviving wife.

Mr. *Heathfield* submitted, that, as the legacy of £80, bequeathed to Elizabeth Palmer, had not been reduced into possession in the lifetime of her husband, the assign-

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ment of the 11th October, 1826, was void as against her. He contended that it was not material that the husband happened to survive the testator's widow and might have reduced it into possession if, in fact, he had not so done. Upon this last point he said that *Ellis v. Williams* (a) was an express authority.

Mr. Henson said that he would not attempt to distinguish this case from *Ellis v. Williams*, but he submitted that that case was not in accordance with the doctrines of the Court. He referred to the dicta of Sir Thomas Plumer in *Joinsen v. Joinsen* (b), of Lord Hardwicke in *Bates v. Denny* (c), and of Lord Lyndhurst in *Hosner v. Morton* (d), as shewing that, where a husband, for valuable consideration, makes an assignment of his wife's choses in action, and by any course of circumstances he comes to have the power of reducing them into possession, the assignment takes effect in equity whether he actually reduces them into possession or not.

The case of *Hutchings v. Smith* (e) was also referred to.

The VICE-CHANCELLOR.—What would have been the effect upon the wife's rights or claims if the husband had *bonâ fide*, for valuable consideration, executed a deed of release of this legacy, I do not say. But I think that the case of *Ellis v. Williams* warrants me in acting upon my own opinion, which agrees with that decision, in the present instance. Finding that case before me, without considering it necessary to enter upon a discussion of decisions and dicta in other cases, I follow it.

(a) 12 Law J., 440 (Ch.); 7 Jur. 337.

(b) 1 J. & W. 476. The next question is, &c.

(c) 3 Russ. 77 n. As to the

mortgage in fee, &c.

(d) 3 Russ. 86. If at the time

of the assignment, &c.

(e) 9 Sim. 137.

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SMITH v. GREEN.

Dec. 18th,
19th & 20th.

BY indentures of lease and release, dated the 10th and 11th February, 1824, John Green conveyed to the plaintiff and his heirs an estate, called the Droveway Estate, part of a larger property of which he was the owner, situate at Castle Eaton, in Wiltshire, by way of mortgage, for securing £950, with interest at £5 *per cent*.

First mortgagee, after the usual notice given him by the second mortgagee to redeem, files a bill of foreclosure. At the end of the term mentioned in the notice, the second mortgagee tenders the mortgage-money and costs to the first mortgagee, which the latter declines to accept:—*Held*, under all the circumstances of the case, that the first mortgagee was not entitled to the costs of the suit after the tender.

In March, 1834, the plaintiff took possession of the mortgaged premises, and thenceforth received for them, through Lediard, his solicitor, a rent of £60 *per annum*, payable yearly, with a deduction of 2*l*. 8*s*. *per annum* for land-tax. This arrangement continued until Lady-day, 1842.

By an indenture of the 20th April, 1826, Green mortgaged the premises for a term of 500 years to Trotman, to secure £500 and interest. That mortgage ultimately vested by assignment in the defendant Mullings.

By an indenture of the 23rd March, 1830, Green again mortgaged the premises to the defendant Bevir, to secure £2000 and interest. And lastly, by an indenture of the 18th October, 1831, he further mortgaged the premises to some ladies named Halgood, to secure £560 and interest.

First mortgagee ought, without a judicial proceeding, to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor.

In November, 1841, John Green died.

On the 15th February, 1843, the defendant Mullings received the following letter from Alexander Smith the brother of the plaintiff:—"I am requested by my brother to apply for 4*l*. 10*s*., being the interest of £950, advanced to the late Mr. Green of Castle Eaton. If you should not be authorized to pay it, you will be so good as to inform me who the executors of the late Mr. Green are, that I may apply to them." In reply to this letter, Mullings, on the same day, wrote as follows:—"Sir,—It was always supposed that Mr. Lediard held the mortgage you allude to upon Mr. Green's estate, and notice was given to him at the time the last payment of interest was made, that only

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at the rate I have set out, which rate, I hope, you will be ready to accept. I shall be ready to do so at any time, upon having your consent. You will be good enough to answer to this letter, and to write as follows:—

—A notice has been sent to the effect of the proposed mortgage to Mr. Lediard, and it is now in his hands. My brother will take no notice of it until he has got the notice from the solicitor, as he will be obliged to do so. My brother is now in the office with the principal and will receive Mr. Lediard's notice from the solicitor. Enclosed is a notice as follows:—“Sir,—I am a partner in the business of Mr. Green, and I am now in the office with the business, further than after the notice from the office. Your brother has given Mr. Lediard to see to the notice, and it seems to me that you must have been told by Mr. Lediard's son. In reference to the notice in question, I have reluctantly agreed to pay off your brother's mortgage for the last two years, which I am obliged to do as second mortgage, and I shall be glad to do so on Lay-day next, or sooner if wished.”

In consequence of this correspondence, a notice in writing, dated the 1st March, 1843, and signed by the defendant Jervis who was a solicitor in behalf of himself and Mulvey and the subsequent mortgagees, was served upon and accepted by Alexander Smith, as the agent of his brother. The notice was to the effect, that, at the expiration of six months, or sooner if it should be agreeable to the plaintiff to receive it, it was intended to pay off the principal and interest due to him on mortgage of the Drove-way Estate.

Soon after the service of this notice, three different applications were made by the plaintiff through his solicitor

to the defendant Mullings for payment of the interest, with an intimation that, on failure of payment, a bill would be filed. On the two first occasions, the defendant's reply was to the effect that he was ready to pay both principal and interest. On the last occasion, the 31st March, he said that the principal and all interest would be paid off at the expiration of the notice, and that the tenant would be paying his rent in May then next, when the interest then due would be paid.

On the 20th April, 1843, the plaintiff filed his original bill for a foreclosure of the premises against the heir and devisees of Green, the defendant Bevir and other parties; omitting to make Mullings a defendant, by reason, as he afterwards alleged by his supplemental bill, that he considered Mullings was acting only in his professional character and as agent for other parties.

On the 29th May, the tenant of the premises paid to the plaintiff's solicitor 57*l.* 12*s.*, being the amount of a year's rent to Lady-day, deducting land-tax.

On the 31st May, the defendant Mullings wrote a letter of that date to the plaintiff's solicitor in these terms:—
“ Sir,—If you will favour me with an account of the interest and costs due to your client, Mr. George Smith, after deducting the rent received, I will endeavour to get the account agreed to by Mr. Bevir, and pay the balance with the principal money, on the execution of the transfer of the mortgage, the draft of which I send for your perusal. I am second mortgagee of this estate, and have the first right to redeem and call for a transfer of Mr. Smith's mortgage, but I shall be ready to obtain a written request or consent from Mr. Bevir and Mr. Green to your clients' making the transfer to me, if you so desire. It seems to me, however, that your client may transfer to any person without incurring any risk beyond the costs of the defendants to his bill; which will be disposed of by their consenting to the payment of his costs.”

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The draft referred to in this letter was that of a simple transfer of the mortgage from the plaintiff to the defendant Mullings. The draft was shortly afterwards returned to Mullings by the plaintiff's solicitor, with the addition of the names of the defendants Bevir and Green as parties to it. Mullings acquiesced in this alteration, and caused an engrossment to be made from the draft as so altered, which engrossment was executed by the defendant Bevir. Green, however, refused to execute it.

An attempt was then made by the defendant Bevir to obtain the concurrence of Green ; but that attempt failing, he, on the 26th August, wrote a letter of that date to the plaintiff's solicitor in these terms :—" Sir,—As I find, after taking an express journey to Hungerford, that Mr. Green is not to be prevailed on to execute the transfer to which I have given my signature, or to concur in any other arrangement for terminating this suit, and as it is objected for your client to assign his mortgage to Mr. Mullings as not a party to the suit without such signature, I propose, in order to save myself further expense, to pay off your client his principal, interest, and costs, and also Mr. Green's costs, and to take a transfer of the mortgage to myself, and therefore beg to submit to you the accompanying draft of such transfer for your perusal and modification in any way you think proper, and trust your client will not be advised to prosecute the suit, which cannot be attended with any possible advantage to himself. I am prepared, and will wait upon you any day, however early, to pay the principal and interest, and to deposit a sum for the costs, as well Mr. Green's as your client's, till they can be ascertained. Should not this proposal be acceded to, it must be considered without prejudice."

On the 30th August, the defendant Bevir, being in London, pressed the agents of the plaintiff's solicitor for a reply to the last-mentioned letter. On the following day the agents wrote as follows :—" If the defendant wants to

redeem the plaintiff, he must apply to the Court in the usual way. We beg he will not delay putting in his answer by the time fixed by the Master."

On the 2nd September, the defendant Bevir received a letter from the plaintiff's solicitor, in these terms:—"Sir,—Upon your producing a consent from Mr. Green to dismiss, I am willing for my client to convey to you or any one else; and if any motion is made for the purpose of terminating the suit, I will not offer any opposition."

On the same day the defendant Bevir replied to the last-mentioned letter as follows:—" *Smith v. Green.* Sir,—If Mr. Green's consent were necessary for the dismissal of this bill, I would not ask you to dismiss it without; but as you are already aware that Mr. Green's consent cannot be obtained, it seems useless for you to make that a condition. The only objection to the dismissal of the bill, as regards Mr. Green, is the liability of your client to his costs, and as I have been willing to deposit with you the amount before the motion to dismiss (which is a hand motion merely) is made, there is an end, I submit, to that objection. I went to town on Wednesday for the purpose of giving instructions for my answer, and while there, caused an application to be made to your agents, in the hope it would not be required; but in consequence of their written reply (a copy of which you have on the other side) my answer has been drawn and the draft forwarded to me to day."

The defendant Bevir not having received any reply to the last-mentioned letter, he, on the 5th September, 1843, wrote and sent to the plaintiff's solicitor a letter in these terms:—" *Smith v. Green.* Sir,—I am exceedingly desirous of getting rid of this suit, and will make one more effort to obtain Mr. Green's consent to the dismissal of this bill; but I wish previously to know whether, if I should succeed in procuring it, you will consent to your client's executing the transfer to me, the draft of which has been submitted to you."

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The plaintiff's solicitor replied by letter of the same date, as follows :—" Sir,—I consider my note of the 2nd instant a sufficient guarantee as to what course the plaintiff would take in the event of your having Mr. Green's consent to dismiss, and that note will be answer to your's of this date. As to the form of the transfer, the plaintiff will execute such as he shall be advised, and if you desire the draft to be returned, it shall undergo such alterations as may be considered requisite, but I cannot stay the proceedings pending such negotiations."

On the receipt of this letter, the defendant Bevir made an application to the solicitor of the defendant Green, requesting his consent to the dismissal of the bill upon payment of his costs, but without success.

On the 18th September, the defendant Bevir, accompanied by Thomas Mullings, the brother of the defendant Mullings, went to the office of the plaintiff's solicitor, and producing £1000 in bank-notes, stated that he was about to go to London to put in his answer, but, before doing so, tendered the notes in payment of the principal and interest due on the mortgage; and added, with respect to costs, that he would either deposit in the hands of the solicitor of the plaintiff a sum for their payment, or would give an undertaking for that purpose. The witness Mullings added, that his brother would join in the undertaking. The plaintiff's solicitor declined to receive the money, without, as the witness for the defendants stated, assigning any reason; but according to his own evidence, on the ground, as he expressed it, that the mortgagor having appeared to the suit, he could not suffer his client to be redeemed, "except upon the terms as in the common case of a foreclosure suit."

On the 22nd September, the plaintiff filed a supplemental bill against Green, Bevir, Mullings, and the Halgoods: alleging, by way of supplemental matter, that, since the filing of the original bill, the defendants Bevir and Mul-

lings, who were mortgagees of the adjoining property belonging to Green, had removed and displaced the fences and boundaries of the Drove-way Estate, so as to render it impossible for the plaintiff to recognize or identify his mortgaged premises with sufficient certainty to enable him to recover them in ejectment, or to proceed to a sale. These allegations, as well as other matter introduced by way of supplement, were totally unsupported by evidence.

The supplemental suit now came on for hearing.

Mr. *Russell* and Mr. *Whatley*, for the plaintiff.

Mr. *Wilcock*, for the defendants, the Greens.

Mr. *Wigram* and Mr. *Parry*, for the defendant Mullings.

Mr. *Swanston* and Mr. *Bevir*, for the other defendants.

In the course of the argument, the case of *Cliff v. Wadsworth* (a) was referred to.

The VICE-CHANCELLOR.—In this case, which, during portions of Wednesday, yesterday, and the present day, has occupied the public time to an extent that, considering its nature, I had not been prepared to think possible, the litigation is substantially about nothing except its own costs. The plaintiff sues as first mortgagee of the estate in question. He is admitted to be so. It is admitted that money is due to him on his security. He has asked, by his counsel at the bar, for an ordinary decree of foreclosure, and for nothing else. It is admitted that he is entitled to an ordinary decree of foreclosure, except so far as such a decree allows the plaintiff to add to his security the costs of the suit; the defendants contending that the plaintiff is

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(a) 2 Y. & C. C. C. 598.

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not entitled to any, and ought to pay some, part of the costs of the suit. The costs of the suit form, therefore, the whole subject of contest; before entering upon which it is as well to mention, that the total amount of principal due to the plaintiff, when his original bill was filed, is admitted on all hands to have been £950; that this sum carries interest at £5 *per cent. per annum*; but that during some time the plaintiff had consented to receive, and did receive, interest at the reduced rate of 4*l.* 10*s.* *per cent. per annum*; and that one year's interest at the larger rate became due on the 11th February, 1843, which interest of one year and the subsequent interest at the same rate were due, and formed the total amount of interest due, when, in April, 1843, the original bill was filed, as all parties also admit. They admit, likewise, that a sum of 57*l.* 12*s.* was received by the plaintiff, on account of interest, in the month of May, 1843. It is not clear, that, when the original bill was filed, anything was due to the plaintiff for costs. Considering what took place in 1843, before the original bill was filed, especially the notice of the 18th March, 1843, I am not satisfied that it was a reasonable step to file that bill. I am not satisfied that it was a measure which ought to have taken place. But, assuming the commencement of the original suit to have been justifiable, I am under the necessity of looking at what took place in the interval between that time and the 19th of September following, especially on the 18th of that September, and in the preceding month. The offers and communications made in that interval were such as, in my opinion, ought to have had the effect of stopping all litigation upon the 18th of September, 1843. I think that the plaintiff, if he had been willing to cease on that day from litigation, might have done so on fair and reasonable terms, providing for him and securing to him all that he ought to have wished. The perseverance, the useless perseverance, by the plaintiff in litigation after that day, it is easier to regret than to

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justify; nor can I say that it was justifiable. I have attended to what has been said by the plaintiff's counsel as to an application under the statute of *Geo. 2*, and as to the right which a mortgagee may be thought to have to refuse to assign, as assigning is distinguished from re-conveying. But those considerations do not, in my view, make any difference. Mr. Mullings and Mr. Bevir, or either of them, may or may not have been able and entitled to apply to the Court under the statute. For the purpose now under consideration, they were not, in my opinion, under any obligation to take that course. And, as to assigning, the strict law may, in a sense, be as stated by the plaintiff's counsel. But it must be remembered, that assigning to a stranger, and assigning to a man who has a right to redeem, are different things; and it must be remembered also what species of conveyance or assignment Mr. Smith will, if redeemed by Mr. Mullings in this suit, be under the necessity of executing. If the plaintiff had objected to assign his debt, so as, keeping it alive, to authorize his name to be used afterwards in an action, that objection, of however precise and rigid a kind, would, very possibly, have been thought sustainable. But I have not observed any trace of such a point having been taken; and to say that a first mortgagee ought not, without a judicial proceeding, to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor, where the second mortgagee does not desire the mortgagor's concurrence, is too much.

With my view of the case in other respects, it is scarcely material to add that the supplemental bill, whether wholly or not wholly wrong on the face of it, appears plainly, upon the materials before me, to be groundless and untenable. It ought, in strictness, probably, to be dismissed; but, as this would produce inconvenience, from the circumstance that Mr. Mullings and the Misses Halgood

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are not parties to the other bill, and as the dismissal of the supplemental bill has not been asked,—has at least not been pressed,—I am not disposed to dismiss it. This is not the only ground upon which, if I make a decree in the form that I am about to state, the defendants should, I think, consent to it. If they decline consenting to it, I will reconsider the matter, and deliver to the registrar other minutes, which may very possibly differ from these to some extent, in substance as well as form.

THE plaintiffs and defendants admitting that the sum of £950 principal money, with interest thereon at the rate of 5*l. per cent. per annum* from the 11th day of February, 1842, but not any greater arrear of interest, was due to the plaintiff on his security in the pleadings mentioned at the time of filing his original bill in these causes, and that the sum of 57*l. 12s.* was paid to him on account of interest in the month of May, 1843; and the defendant, Joseph Randolph Mullings, now offering to pay to the plaintiff, immediately on account, the sum of £800, without prejudice to any question of account, * * * * * and the defendant consenting to this decree,—~~REFER~~ it to the Master to take an account of what is due to the plaintiff for principal and interest on his mortgage security. Refer it to the taxing Master to tax the plaintiff his costs of these suits up to the 18th day of September, 1843, inclusive; and let such costs, when taxed, be added to the amount of such principal and interest due to the plaintiff. Let the taxing Master inquire whether any thing, and what, is due to the plaintiff for any and what costs, charges, and expenses properly incurred by him in respect of his mortgage security, not being costs of these suits, or either of them; and if the said Master shall find that any thing is so due, let the amount thereof be also added to the amount of principal and interest found due to the plaintiff for his debt; and upon the defendant, Joseph Randolph Mullings, paying unto the plaintiff what the said Master shall find due for such principal, interest, and costs, and for such costs, charges, and expenses, if any, within six months after the Master shall have made his report, at such time and place as the said Master shall direct, let the plaintiff convey and assign unto the said Joseph Randolph Mullings, or as he shall direct, the mortgaged premises, &c.

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Dec. 20th.

PALIN v. GATHERCOLE.

MOTION to dissolve an injunction which had been obtained by the plaintiff *ex parte*, by which the defendant and his servants, &c. were restrained from printing or publishing certain letters mentioned in the bill, or shewing them or any of them to any person or persons, and from informing any person or persons of them or any of their contents, until answer or further order.

The defendant, Mr. Gathercole, was a clergyman, and the editor of the Church Intelligencer. The plaintiff was also a clergyman, and rector of Stifford, in the county of Essex. He was in the habit of corresponding with the defendant, and occasionally furnished articles for his paper.

On the 8th March, 1843, the defendant published in his paper an article which he had drawn up from materials furnished by the plaintiff, and which related to a dispute between the plaintiff and Mr. Nokes, the churchwarden of Stifford. The article was considered by Nokes to contain some reflection upon his character, and in June following he brought an action against the defendant, as the editor of the Intelligencer, for a libel. The defendant apologized, and the action was discontinued. The defendant then applied to the plaintiff to contribute half the expense of the action, which the plaintiff refused to do. The defendant then published in his paper an article imputing to the plaintiff the authorship of the article respecting Nokes. This led to an action by the plaintiff against the defendant for a libel, to which the defendant pleaded, by way of justification, that the materials for the article respecting Nokes had been supplied by the plaintiff. The action came on for trial in July, 1844, when a verdict was entered for the plaintiff, with 40s. damages. Notwithstanding

A. brought an action against B., the editor of a newspaper, for stating in his paper that the plaintiff was the author of a certain libellous article which had appeared in the paper. To this action B. pleaded by way of justification, that the matter from which the article had been drawn up had been furnished by the plaintiff in letters written to him by the defendant. Upon the action coming on for trial, the defendant submitted to a verdict of 40s. in favour of the plaintiff. The defendant afterwards shewed some of the letters to third persons. Upon a motion before answer, to dissolve an injunction which the plaintiff had obtained to restrain the publication and production of the letters, the Court refused the application; more especially as upon the motion for the injunction the

plaintiff had produced an affidavit to the effect that the verdict was taken under an arrangement that the letters should be delivered up, which affidavit was not sufficiently contradicted on the motion to dissolve.

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ing the verdict, the defendant, in order, as he alleged, to justify himself to the world, shewed or mentioned the contents of the plaintiff's letters to third persons ; whereupon the present bill was filed.

Upon the motion for the injunction, it was stated in an affidavit filed on behalf of the plaintiff, that the plaintiff's verdict had been taken under an arrangement that the letters to the defendant should be delivered up to him. The plaintiff also stated by his own affidavit that he believed that the letters in the possession of the defendant not only related to the dispute between himself and Nokes, but to other matters ; and that many of the letters were long anterior in date to the matter in question : that he kept no copies of such letters, and that he believed the publication of them by the defendant would tend materially to his injury. He denied that he had authorized the plaintiff to publish his letters, but admitted he had, in a qualified manner, permitted the defendant to publish the information conveyed in them respecting Nokes.

Upon the present motion, affidavits were produced on the part of the defendant, tending to shew that the statement contained in the affidavit filed for the plaintiff, respecting the agreement to deliver up to him the letters, was incorrect.

Mr. *Wigram* and Mr. *Hetherington*, for the motion.—The injunction goes an unusual length in restraining the defendant from shewing the letters. No such agreement as that which is suggested on behalf of the plaintiff ever took place. The defendant, therefore, having the possession of the letters, has a right to publish, or at least to shew to his friends, such part of them as may be necessary for the purpose of vindicating his own character. That proposition is warranted by the language of Lord *Eldon* in *Gee v. Pritchard* (a), although there the injunction was sustained

(a) 2 Swanst. 402.

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by reason that the defendant had given up his right to retain the letters, and was therefore not justified in publishing copies of them. We have no desire to retain any letters which relate to other matters than the subject of the actions. The plaintiff has only the ends of justice in view, and the maintenance of his character with respectable persons in his diocese. The judgment at law does not decide that we were not justified in publishing at least one half of the letters. The production of them would shew that a great part of the information upon which the article was founded was derived from the plaintiff. If parties correspond with editors, are editors to bear all the blame of publishing a libel, without being allowed to justify themselves by shewing who supplied the information? The case of *Lady Percival v. Phipps* (a) is very similar to the present. The grounds upon which Sir *Thomas Plumer* dissolved the injunction were, that the defendant was, by the plaintiff's conduct, held out to the public as a person giving false intelligence, and was never authorized by the plaintiff to make the communications in question, the defendant insisting on his right to shew from the letters whence the intelligence was derived, and denying, according to his belief, that any confidence was placed either in Mitford or him. The like observations apply to the present case. No confidence here was reposed in the defendant as to the non-publication of the letters, and it is clear that the plaintiff has not the sole interest in the letters. The receiver has a joint interest in them with the writer, and may use them for the purpose of his own justification.

Mr. *Russell*, Mr. *E. James*, and Mr. *Terrell*, *contrà*, were stopped by the Court.

The VICE-CHANCELLOR, after observing that the affi-

(a) 2 Ves. & B. 19, 29.

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davits on the part of the defendant did no more than bring into dispute and question the statement of the plaintiff as to the arrangement respecting the delivering up of the letters, and that the Court was not, in a condition to say that the injunction had been obtained by fraud, proceeded thus:—

Under such circumstances, I am not sure that, if I had proceeded in granting the injunction mainly on the supposed fact of that agreement, I should now dissolve it; but, to the best of my recollection, I did not grant the injunction mainly on the assumption of the existence of that agreement. I took it as a circumstance in the case, but, if it had been out of the case, I rather think that I should have granted the injunction.

The letters of the plaintiff were plainly not written with a view to publication as they were written. They were written, as the plaintiff states, for the purpose of giving information to the defendant to be used in a given manner. The defendant says he used it in a given manner. The plaintiff says he used it, in a manner not justified by the plaintiff's instructions. The matter which the defendant says was communicated by the plaintiff was considered by Nokes as libellous, and he brought his action against the defendant. The defendant compromised the action by paying Nokes's costs, and tendering and publishing an apology. That, I apprehend, closed the matter as between the defendant and Nokes; the defendant admitting the illegality of what he had published as against Nokes.

The defendant, however, conceiving that he had a claim against the plaintiff for the costs, which he had submitted to pay to Nokes, and the plaintiff refusing to accede to that claim, for the reasons stated, the defendant published of the plaintiff a statement, which in effect was this—that the libel upon Nokes was communicated to the defendant by the plaintiff; and that, although he, the defendant, was

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liable to Nokes in the action, yet the plaintiff was substantially and in truth the author of it. In consequence of this publication respecting the plaintiff, he brings his action against the defendant. The defendant pleads, besides the general issue, a justification to the effect which I have already stated, namely, that this matter, however libellous, as between Nokes and Gathercole, was matter of which, as between Palin and Gathercole, Palin was the author. Upon that justification issue is joined, the venue is laid in Surrey, the parties proceed to Guildford, and immediately before the trial the defendant adopting, though with reluctance, the advice of his counsel, submits to a verdict of 40s., carrying costs. This was a general verdict, followed by a general judgment; which verdict and judgment, together, established that the justification failed, and, therefore, in substance, the affirmative of the proposition, that the libel published by Gathercole of Nokes was not a libel which Palin had communicated to Gathercole.

The action of Nokes having succeeded as I have stated,—the action between Palin and Gathercole having succeeded, as I have stated,—Gathercole now desires to publish the letters between Palin and himself, which he says will prove that the justification did exist, which the verdict and judgment have established not to exist.

Under these circumstances, it would be too much to give way to the arguments ingeniously used by the defendant's counsel with respect to this injunction. Perhaps, hereafter, upon a more extended view of the case, upon distinctions, then to be brought forward, which do not now appear, the injunction may not stand. The only question now is, whether, upon such a subject-matter as this, having regard to the nature and objects of the jurisdiction of this Court as to injunctions, I ought at present to dissolve this injunction. I am of opinion that I ought not.

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His Honor afterwards said, that the defendant should be at liberty to exhibit the letters to his solicitors and counsel in the cause; and he reserved the costs of this motion.

MEMORANDUM.

EARLY in Hilary Term, 1845, Sir *John Gurney* resigned his office of a Baron of Her Majesty's Exchequer. He was succeeded by *Thomas Joshua Platt*, Esq., of the Inner Temple, one of her Majesty's counsel; who shortly previous to his appointment was called to the degree of the coif, and gave rings with the motto "*Labor et Fides*," and, after his appointment, received the honour of knighthood.

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Jan. 25th.

WHITMARSH v. ROBERTSON.

By a marriage settlement certain stock in the funds was settled upon the intended husband and wife for their joint lives and the life of the survivor, and then upon the children of the marriage, with a power to the trustees, with the consent of the wife, to advance part

of the fund for the benefit of the children in her lifetime. There were four children of the marriage. The husband died. The wife married again. The second husband assigned the wife's life-interest for value. After the assignment, the trustees, with the consent of the wife, exercised the power of advancement in favour of the children of the first marriage:—*Held*, that the power was well executed as against the assignee of the second husband.

(a) See 1 Y. & C. C. C. 715.

ham was desirous that the sum of £480, or such other less sum as thereafter mentioned, should be raised out of the trust fund in part of their respective expectant portion therein, in order that the same might be applied for their advancement and benefit; it was witnessed that the said Anne Maria Mileham, pursuant to, and by force and virtue and in exercise and execution of, the power or authority given or limited to her by the settlement, and of all other powers, &c., did, by that deed or writing, consent, direct, appoint, and request that the said trustees should forthwith raise, out of the said sum of £1757 Consols, the sum of £480 sterling, or such other less sum as they should think proper, and should apply the sum so to be raised for the advancement and benefit of the four children, in manner in the deed mentioned.

Immediately after the execution of this instrument, notice of it was served on the trustees of the settlement; but they declined to act without the sanction of the Court.

A petition was accordingly presented on behalf of the four children for whom the advancement was intended to be made, praying that it might be declared, that, notwithstanding the marriage of Mrs. Mileham with her present husband, William Mileham, and also notwithstanding the indenture of the 4th April, 1837, whereby Mrs. Mileham's life-interest in the Consols was assigned by her present husband to the plaintiff, the power given to Mrs. Mileham by her former marriage settlement, of consenting to the advancement of the petitioners, was a valid and subsisting power, and was well executed by Mrs. Mileham by the deed-poll or writing of the 8th January, 1845; and that the trustees might be directed and empowered forthwith to levy and raise, out of the sum of £1757 Consols, the sum of £480 sterling, or such other less sum as they should deem proper, in part of the petitioners' expectant portions therein, and to apply the same for the advancement and benefit of the petitioners, in manner in the said deed-poll

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or writing mentioned, or in such other manner as the said trustees should in their discretion think fit.

Mr. *Shapter* and Mr. *Hanson* for the petition.—The question is, whether Mrs. Mileham can consent to the trustees advancing the children, notwithstanding the claim of the plaintiff under the assignment of April, 1837. It is not necessary to argue that the power was a trust which could not be released or extinguished, so as to bring the case within the principles of *Jesson v. Wright* (a), *West v. Berney* (b), *Bickley v. Guest* (c), *Smith v. Death* (d), *Horner v. Swann* (e), and others of that class; for here, Mrs. Mileham has not executed any deed, or done any act with a view to release her power. Her second marriage has not that effect. What her second husband acquired by his marital right, or, in other words, under an assignment by operation of law, was subject (as in all cases of general assignment) to the incidents, liabilities, and equities, to which the fund was originally liable: *Rumsey v. George* (f), *Thomson v. Butler* (g), *Stiffe v. Everitt* (h), *Mitford v. Mitford* (i). One of those incidents was a liability to be defeated by the execution of the power: *Bayley v. Warburton* (k). The power was well executed, and the purchaser from the husband can have no better title than the husband had.

In *Ray v. Pung* (l), *Doe v. Jones* (m), *Lawson's case* in *Tunstall v. Trappes* (n), and *Skeeles v. Shearly* (o), it was held, that dower and the lien of a judgment which had attached on a person's estate might be defeated by his exe-

(a) 2 Bligh, 1.

(b) 1 Russ. & Myl. 431.

(c) 1 Russ. & Myl. 440.

(d) 5 Madd. 371.

(e) Turn. & Russ. 430.

(f) 1 Maule & Selw. 176.

(g) Moore, 522.

(h) 1 Myl. & Cr. 37.

(i) 9 Ves. 87, 100.

(k) Com. 494.

(l) 5 Barn. & Ald. 561.

(m) 10 B. & C. 459.

(n) 3 Sim. 300.

(o) 8 Sim. 153; 3 Myl. & Cr. 112.

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cutting a power, those being titles by operation of law; and it being acknowledged that the party could not, by executing his power, defeat any grant or alienation or act of the party himself. The cases of *Jones v. Winwood* (a), and *Hole v. Escott* (b), are not inconsistent with this distinction. In the former case the power was general, and such powers are, by the Bankrupt and Insolvent Acts, vested in the assignees. In the latter case, where the power was particular, the distinction between acts of law and acts of the party was preserved, the case being treated as an exception, on the ground of the construction favourable to creditors which is put on the Bankrupt and Insolvent Acts; and the vesting of the bankrupt's estate in his assignees being deemed equivalent to a conveyance (c). These principles distinguish *Noel v. Lord Henley* (d) from the present case. There, a tenant for life, with a power of advancing portions, assigned his life interest, and was not allowed to defeat his own act by exercising the power. Here, the act was not that of the wife or the trustees, but of the husband. The joining of the wife in the assignment was, of course, nugatory: *Hutchings v. Smith* (e), *Elwin v. Williams* (f), *Ashby v. Ashby* (g).

Mr. Russell and Mr. Stinton, for the plaintiff, contended that there had been no execution of the power; for, although Mrs. Mileham had consented to the execution, the trustees had not executed it, and, moreover, declined to execute it, unless authorized by the Court. The power to consent was released by Mrs. Mileham's marriage: *Badham v. Mee* (h). The marriage was an assignment by Mrs. Mile-

(a) 3 Mees. & W. 653; 10 Sim. 150.

(b) 2 Keen, 444; 4 Myl. & Cr. 187.

(c) 2 Keen, 465.

(d) M'Clel. & Younge, 302.

(e) 9 Sim. 137.

(f) 12 Law J. 440; (Ch.)

(g) Ante, p. 553.

(h) 7 Bing. 695.

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she is at present and her husband for a while
 the trustees. He seems to have been
 the only one who was with her. However, the
 trustees were not present. There was no other
 person present. The only person present was the
 wife.

The trustees—trustees in this case,
 the trustees whether was secured or not by
 the husband even the trustees settlement upon her
 the trustees and her second husband, and as under the
 trustees settlement she seems to be the trustees after
 the trustees' death of her husband the trustees set-
 tlement to take effect in case of her husband's death. When
 he died, therefore, it was made in all the incidents to
 which the trustees in settlement of her husband's
 estate, and of her husband's estate, and her husband's
 settlement. But in the trustees was directed under
 a trustees settlement, it was in fact, under all the
 provisions affecting a trustees in that instrument.

What would have been the effect upon the capacity of
 exercising this power, if Mrs. William, when a widow, had
 sold or mortgaged her interest, I leave particularly
 to be understood as not giving any opinion whatever. In
 point of fact, the sale was made by her second husband
 and herself, so far as she could join in the act, after the
 second marriage.

The first question then is, whether, if this sale had not
 been made, and the second husband and herself had done
 as much act, she could have exercised this power; that is,
 whether she could have effectually consented to the trust-
 ees acting under the advancement clause, without and
 against the consent of her second husband. I am of
 opinion that she could; that this power of giving the consent
 was a power with which marriage did not interfere; that

she remained immediately after the second marriage at full liberty, and fully entitled, however it might prejudice that life interest to which her husband was entitled, or partly entitled, in her right, to exercise the power of consent; and that the trustees, without and against the consent of the husband, were authorized to give effect to that consent. If that is so, could a sale by the husband of the life interest make any difference? I am of opinion that it could not, and that a purchaser from him stood in no better situation than he would have done if that sale had not been made.

The next question is, whether the wife's concurrence in the instrument of sale made any difference. Generally speaking, a married woman cannot execute a deed; she can do no act of this description, except in respect of an estate settled to her separate use, or in the exercise of a power given to her. Separate use here is out of the question; there is no such thing. A power has been given to her, but the existence of a power only enables her to do an act under the power conformable to the power; it does not enable her to deal with the subject of the power in any manner not in conformity with the power. Dealing with the subject of the power in a manner not conformable with the power, she deals with all the disabilities of a married woman, and subject to all the considerations which affect the act of a married woman; and as the sale to Mr. Whitmarsh was an act not under the power, and not in conformity with it, I am of opinion that the act is in no sense to be considered her act, and is, as to her, a nullity. I am of opinion, therefore, that her consent is as effectual as it would have been if she had never married, and as if no sale had been made.

As the matter stands, however, and in a suit in which the only plaintiff is the purchaser, it may be difficult to give practical effect to this consent. I am of opinion, however, that it is not to depend upon the plaintiff's option

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merely, whether such a suit shall or shall not be confined in its operation to the administration of the trust as far as it regards the life interest. The decree hitherto made has been confined to the life interest, but the decree is not exhausted ; there is a specific provision in it, that the hearing of the cause in all other respects shall stand over, with liberty for all parties to apply. It will be, therefore, a legitimate course that this cause should now be set down to be further heard, and being so set down, it will be a legitimate course, against the consent of the plaintiff, and with the consent of the defendant, to administer the trusts generally ; and in administering the trusts generally, it will be the duty of the Court, if a consent by Mrs. Mileham shall be regularly found upon which the trustees consider it consistent with their duty to act, to give effect to that consent, and to the willingness of the trustees to do an act consequent upon that consent.

His Honor then directed that the petition should stand over till a future day, on which an affidavit should be produced as to the number of children, and of the persons entitled to participate in the fund ; and that, on the same day, the cause should stand in the paper to be further heard upon the subject of the decree reserved.

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GARMSTONE v. GAUNT.

Jan. 11th.

WILLIAM WEAVER, being the lessee of five tenements holden for three lives under the Bishop of Worcester, devised all his freehold hereditaments to trustees and their heirs, upon the trusts following; (that is to say), as to one of the tenements held under the bishop's lease, in trust, during the life of his daughter Mary, by and out of the rents and profits thereof, or otherwise, to keep the premises in repair and full lived, and to pay the fines and expenses attending any renewals and repairs thereof; and, subject thereto, to permit and suffer his said daughter Mary Weaver to receive and take the rents and profits thereof for her life; and from and after her decease, in trust for all and every the child and children of his said daughter Mary Weaver who should be living at her decease, and the issue of any child or children of his daughter Mary Weaver who should be then dead leaving lawful issue, (such issue to be entitled to his or her deceased parent's share), their, his, or her heirs or assigns.

Sale of infants' property carried into execution under special circumstances.

The testator then devised the four other tenements to his four other children respectively, and their issue, in the same terms as he had devised the first tenement, except that, as to the third tenement, the words "or otherwise," and, as to the fifth, the words "by and out of the rents and profits thereof, or otherwise," were omitted.

The testator bequeathed the residue of his personalty to his children and their issue, and he appointed the before-mentioned trustees his executors; and he authorized and empowered his trustees, when and as occasion might require, to surrender, or join in surrendering, the present or any future lease or leases of the said leasehold premises, for the purpose of obtaining a renewal or renewals thereof; and he directed that his trustees should stand seised of,

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and interested in, the leasehold estates to be comprised and granted in and by such new lease or leases as aforesaid, upon the same trusts, or as near thereto as might be, as were thereinbefore declared concerning the premises.

The present bill having been filed by some of the tenants for life against the surviving trustee, and against the other persons interested under the will, praying that the leaseholds might be renewed in such manner that the expense of the renewal might be properly apportioned between the tenants for life and remaindermen, having regard to the value of the property, the Master reported the following circumstances:—That the lease held by the testator had been surrendered by the surviving trustee, and that, in consideration of a fine of 502*l.* 10*s.*, the bishop had granted a new lease; but that, the fine, fees, and expenses payable upon the granting of such new lease remaining unpaid, the new lease remained deposited with the bishop's secretary, until the fine and interest thereon and expenses, amounting to 672*l.* 10*s.*, should have been paid, together with future interest to the time of payment. That since this renewal another life had dropped. That the rental was £115 *per annum*. That the solicitor of the plaintiffs had deposed, that, considering the circumstances, and the delay which would arise in procuring a further renewal of the lease, by reason that, until the other parties holding property under the original lease agreed to renew, the bishop's steward would not fix the fine and expenses payable by the parties interested under the testator's will, which delay would involve the risk of the dropping of the two existing lives,—and also considering the amount of the fine and expenses on the last renewal,—the fine and expenses of further renewal would be so large that it would not be repaid by the increased purchase-money on a sale of the premises. That the same solicitor had further deposed, that, the parties interested in the premises being all persons in very humble conditions in life, and

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several of them being infants, whose interests were reversionary, and there being no fund wherewith to pay the fines, interest, and expenses, there was no way by which, having regard to the testator's will and other circumstances, the same could be raised, unless it were determined to sell the property immediately, and some person could be found willing to advance the same, upon the terms of being repaid the amount of such advance, with interest thereon after the rate of *£5 per cent. per annum*, out of the proceeds of such sale, to enable the parties to obtain possession of the lease, and proceed to a sale thereof, as thereafter mentioned. And the Master found, that the executor of the testator admitted before him, that, although the accounts of the testator's personal estate had not been taken, it had been sufficiently ascertained, from the accounts already rendered, that such personal estate would not be sufficient to pay all the legacies, and, therefore, there would be no surplus out of which a fund could be provided to pay the fine, fees, and expenses then payable in respect of the leasehold property, or upon any future renewal thereof, in case such future renewal should be approved, and effected under the sanction of the Court. And the Master stated his opinion to be, that it would not be for the benefit of the persons interested in the leasehold premises under the will, that the lease lately granted, and yet remaining in the hands of the secretary of the Bishop of Worcester, should be renewed; and that, having regard to the terms of the testator's will, and other circumstances thereinbefore stated, the fine, fees, and expenses payable in respect of such new lease so granted by the bishop, together with the interest to become due thereon, should be raised by sale of the leasehold premises; the plaintiffs and the defendant the executor being both ready to advance the funds necessary for paying the fine, fees, and interest on taking up the said lease, upon having the amount so advanced repaid to the party making the ad-

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vance, with interest at £5 *per cent. per annum*, out of the produce of the sale of the said leasehold premises.

This report was confirmed, and, by an order dated the 12th July, 1844, it was ordered that Richard Williams should be at liberty to advance the amount necessary for taking up the lease in the hands of the bishop's secretary, on behalf of the parties interested therein; and that a sale should be made of the entire property comprised in the lease.

William Hammond being reported the purchaser, his purchase was confirmed absolutely on 3rd December, 1844, and he paid his purchase-money into court, to the credit of the cause.

The purchaser now moved that he might be discharged from his purchase, and that the sum of 1493*l.* 5*s.* 3*d.* purchase-money and interest thereon, paid by him into court, might be paid out to him.

Mr. *Shapter*, for the motion, contended, that, unless the order for sale could be sustained on the ground that the trusts for renewal authorized a sale, the order was improper; for the Court could not direct a sale of the estate of infants on the mere ground that the sale would be beneficial to the infants: *Calvert v. Godfrey* (a), *Peto v. Gardner* (b), *Stone v. Theed* (c). The case of *Reeves v. Creswick* (d), when attentively considered, was not at variance with this general rule. . Here, the trusts for renewal did not authorize a sale.

Mr. *Terrell*, *contrà*, for the plaintiffs.—The general proposition, that the Court will not direct a sale of an infant's estate, is not disputed: but here no benefit can be obtained for the parties interested except by a sale. Neither a mortgage nor an accumulation of rents and profits will

(a) 6 Beav. 97.

(b) 2 Y. & C. C. 312.

(c) 2 Bro. C. C. 243.

(d) 3 Y. & C. 715.

have that effect. In *Calvert v. Godfrey* the benefit of the infant was made the sole ground of application for a sale, and it was held that the Court had no jurisdiction to order it. Here, the testator has himself directed a trust for sale. The trustees are to keep the premises in repair and full lived, and to pay the expenses of renewals and repairs "out of the rents and profits." These words authorize a mortgage or sale: *Allan v. Backhouse* (a). [The Vice-Chancellor.—In that case, the plaintiff was not only interested under the will, but stood in the position of a person who had renewed and had a lien.] Suppose the Court has directed a sale of more property than is required for the purposes of the will, yet, where a part has been raised, the purchaser has not been allowed to inquire whether the Court has exercised its jurisdiction properly.

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Mr. *Temple* appeared for a party interested under the will, and also for Richard Williams.

Mr. *Kenyon-Parker*, for the defendant the trustee.

Mr. *Shapter*, in reply, referred to *Wilson v. Halliley* (b), *Ryder v. Bickerton* (c), *Heneage v. Lord Andover* (d).

THE VICE-CHANCELLOR.—Considering what was done in *Allan v. Backhouse*, and the principles applicable to such a case, if Mr. Williams will apply to the Court in this cause by motion, stating that he made the advance, and that he desires to be repaid, it may, upon that motion, and upon the present motion, be referred to the Master to inquire whether it will be for the benefit of all parties that a sale should take place; and if the Master shall report in the affirmative, I think a title may be made. But, circum-

(a) 2 Ves. & B. 65.

(b) 1 Russ. & M. 590.

(c) 3 Swanst. 80, n.

(d) 3 Y. & J. 360.

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stanced as the title now is, it is too doubtful to force upon the purchaser.

In *Allan v. Backhouse*, the only reference, as I understand it, was this: to inquire as to the expediency of raising the money by sale or mortgage. The learned and careful Judge who heard the cause did not, I apprehend, think of directing a sale of more than part of the property. There the trustee, having refused to advance the money, the tenant for life advanced it out of his own property, and so obtained a lien—a circumstance upon which, I observe, Sir *Samuel Romilly* relied in his argument.

After some discussion, it was arranged that an order, suggested by the *Vice-Chancellor*, and of which the following are the minutes, should be adopted:—

RECITE the purchaser's motion. Recite, that Robert Williams, informing the Court, that, since the order of the 12th July, 1844, he had advanced the amount necessary for taking up the lease in the hands of [*the bishop's secretary*] on behalf of the parties interested therein; and that the amount so paid was the sum of £—; and that he was desirous that the same should be raised by sale or mortgage of the leasehold property in the pleadings mentioned, moved that the same might be sold, or otherwise made applicable for the payment of his demand. He submitting to the jurisdiction of the Court in all respects, and the said [*parties to the cause*] not opposing the said motion, and the said W. Hammond [*the purchaser*] not objecting to the title, except so far as it is affected by the said order of the 12th July, 1844, refer it to the Master (upon both motions) to inquire whether R. Williams paid the said sum of £—, and when, and whether the same was a proper payment. And if the Master shall find it was so paid, and was properly so paid, let the Master inquire whether, having regard to that circumstance, and to the rights of all parties interested, it would be for the benefit of the persons interested, and to be interested, under the testator's will, that the sale made to the said W. Hammond be confirmed and carried into execution. Liberty to state any circumstances specially, &c.

The Master reported in favour of the confirmation of the sale, and the sale was accordingly effected.

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BOND v. WARDEN.

Jan. 19th.

IN October, 1841, a contract was entered into between the plaintiff Bond and Richard Wallin, for the sale to the latter of a farm in Warwickshire, for the sum of £4200. Wallin, having entered into possession, by his will devised the farm to the defendants Warden and Smith, upon certain trusts, and died in March, 1842, without having paid the purchase-money.

On the afternoon of the 20th of April, 1843, the plaintiff and his solicitor, and some other parties interested in the estate, met the trustees under Wallin's will at Lutterworth, to complete the purchase, whereupon the plaintiff executed the deeds of conveyance to the trustees, and signed a receipt for the sum of £4734, the amount of the purchase-money and interest, and at the same time took from the defendant Smith a cheque for that amount, drawn on the bank of Messrs. Clarke, Mitchell, Phillips, & Smith, at Lutterworth.

The cheque was in this form:—"20th April, 1843. Messrs. Clarke, Mitchell, Phillips, & Smith, bankers, Lutterworth, pay John Bond, Esq., or bearer, four thousand three hundred and seventy-four pounds. For executors of R. Wallin,—Joseph Warden, Thomas Smith. £4374." Across the face of the instrument were written the words "Accepted for Clarke, Mitchell, & Co., J. Meldrun." The instrument was not stamped.

This cheque was delivered by Smith to the plaintiff at half-past five o'clock on the 20th of April, the Lut-

A cheque for £4700, drawn upon the Lutterworth Bank, was given to A., at Lutterworth, on the 20th April, after banking hours, in payment for an estate. A., who lived three miles from Lutterworth, immediately handed the cheque to B., to be placed to A.'s account at the Rugby Bank. Rugby is six miles from Lutterworth. On the arrival of the cheque the same day at Rugby, the Rugby Bank had closed; but the cheque was deposited with one of the partners of that bank for the night, and in the morning of the 21st April it was paid into the bank, and on the same day transmitted by post to the Lutterworth bankers, with directions to send the amount to London. The

Lutterworth bankers received the cheque early on the 22nd. At half-past one o'clock on that day they stopped payment:—*Held*, that the deposit of the cheque with the Rugby bankers was a reasonable and probable course on the part of A.; consequently, that the presentment to the Lutterworth Bank was in time to prevent the cheque from becoming his cheque, and that the debt was still due to him.

An unstamped cheque addressed to Messrs. C. & Co., bankers, Lutterworth, but not expressed to have been issued at or within the legal distance of Lutterworth, is void within the statutes, which require that such a cheque shall have the place of issue specified in it.

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terworth Bank having closed at four. The plaintiff, who lived about three miles from Lutterworth, then handed the cheque to a Mr. Waters, who was present at the meeting, and who was about to go to Rugby, with directions to deposit it, on his, the plaintiff's, account, in the National Provincial Bank at that place. Waters accordingly, accompanied by the plaintiff's son, took the cheque to Rugby, which is about six miles distant from Lutterworth, and at seven in the evening delivered it to Mr. Sale, the manager of the Rugby Bank. That bank having closed for the day, Sale, who resided there, deposited it in a place of safe custody for the night. On the following day, the 21st of April, having ascertained the course of the post to Lutterworth, he sent it by post to the Lutterworth bankers, with directions to them to pay the amount to the London and Westminster Bank. The Lutterworth bankers received the cheque early in the morning of the 22nd of April. At half-past one o'clock of the same day they stopped payment, and the cheque was consequently returned dishonoured.

The plaintiff filed his bill against the trustees and devisees under Wallin's will, praying for the specific performance of the agreement to purchase the property in question, for the payment of the purchase-money, and for a declaration that he was entitled to a lien on the property for the amount of the purchase-money and interest.

At the hearing, two points were relied on for the plaintiff: first, that the cheque, not being stamped, and not (as the plaintiff contended) shewing upon the face of it the place of issue, was invalid; and, secondly, supposing it to be valid, that the plaintiff had taken the earliest and best means to present it for payment, and had not, by laches in that respect, made the cheque his own.

By the stat. 55 Geo. 4, c. 184, there is an exception from stamp duties of all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn

upon any banker or bankers who shall reside or transact the business of a banker within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders.

And by the stat. 9 *Geo.* 4, c. 49, s. 15, it is enacted, that all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn in any part of Great Britain upon any banker or bankers who shall reside or transact the business of a banker within fifteen miles of the place where such drafts or orders shall be issued, shall be exempted from any stamp duty imposed by any act or acts in force immediately before the passing of that act, provided the place where such drafts or orders shall be issued shall be specified therein, &c.

In order to meet the objection as to the form of the cheque, the defendants' counsel read the depositions of a former clerk in the banking-house of Clarke, Mitchell, & Co., wherein he stated, that on the 20th of April he filled up the body of the cheque for the defendant Smith, who signed it, and that the word "Lutterworth" was printed upon the cheque or draft, as the name of the place where such cheque or draft was issued, or purported to be issued, at the time it was so filled up and signed.

Upon the point of laches, the evidence of John Meldrun, who had also been a clerk in the same banking-house, was read for the defendants. He stated, that, during all the banking hours of the 21st April, and up to one o'clock on the 22nd April, all cheques drawn upon Clarke, Mitchell, & Co. were duly paid.

Mr. *Wigram* and Mr. *Freeling*, for the plaintiff, upon the question as to the validity of the cheque, cited *Ruff v. Webb* (a), *Wilson v. Vysar* (b), *Waters v. Brogden* (c); and

(a) 1 Esp. 129.

(b) 4 Taunt. 288.

(c) 1 Y. & J. 457.

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upon the question of laches, *Rickford v. Ridge* (a), *Derbshire v. Parker* (b), *Williams v. Smith* (c), *Kilsby v. Williams* (d), *Moule v. Brown* (e), and *James v. Holditch* (f); contending, that, according to the general law, the plaintiff, not having received the cheque in due time on the 20th April, was not bound to send it to Lutterworth till the post of the next day, the post being the regular channel of delivery.

Mr. *Russell* and Mr. *Speed*, for the defendants.—Where a cheque is not received at the place where it is made payable, the party receiving it may wait until the following day's post, in order to transmit it for payment: but where the cheque is received at the same place at which it is made payable, (as was the case here), it must be presented for payment on the following day: *Boddington v. Schlencker* (g), *Moule v. Brown*. To present a cheque, is to put it in the hands of a person to demand payment. Was that the course taken in this case? Clearly not. The delivery to Waters was not for the purpose of presentment, but for the plaintiff's own convenience. And the banker to whom Waters delivers it does not require payment in the ordinary way, but directs the Lutterworth bankers to transmit the money to London. Under the circumstances this was not a valid presentment. It is in evidence, that, if the cheque had been regularly presented at any time before one o'clock on the 22nd, it would have been paid. The plaintiff was bound to present it before the expiration of that time: *Camidge v. Allenby* (h).

As to the validity of the cheque itself, if the place of issue appears upon it, though not in a formal manner, the Court

(a) 2 Camp. 537.

(b) 6 East, 3.

(c) 2 B. & Ald. 496.

(d) 5 B. & Ald. 815.

(e) 4 New Ca. 266; 5 Sc. 694.

(f) 8 D. & R. 40.

(g) 4 B. & Ad. 752.

(h) 6 B. & C. 373, 382.

would be reluctant to say it was a bad cheque, and require it to be stamped as a bill of exchange. Now, it is in evidence for what purpose the word "Lutterworth" was printed upon it.

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THE VICE-CHANCELLOR.—I think the plaintiff right on both points. By the stamp acts, or one of them, it is required, in order to the exemption from a stamp, that the place where the cheque is issued or drawn shall be expressed upon it; meaning, so expressed upon it as to shew the place where the cheque is issued or drawn. The mere circumstance, that the place is mentioned upon it for another purpose, is, of course, insufficient. The question is, for what purpose the word "Lutterworth" is here written. Clearly to describe the place of residence of the bankers as bankers, not to designate the place where the cheque was drawn. This, then, was an insufficient security, a void cheque—a cheque upon which an action could not be maintained: and although the mistake was mutual, and nothing wrong was intended; and although the person who received the cheque was as much bound to know the law as the person who gave it, yet it lay upon the person who gave the cheque to make a valid payment or give a valid security. I think that there was no payment.

But, supposing the cheque not void, a question arises whether reasonable diligence was used in presenting it. It was delivered in the town where it was drawn, and where it was made payable, but after the banking-house upon which it was drawn had closed, and after it had become impossible to receive the money on that day. What was it incumbent on the person who received this cheque to do? He was a country gentleman, or farmer, living two or three miles out of the town. There were bankers at Rugby, some eight miles distant, whom (whether he had employed them previously or not) he chose to employ for that purpose. He sends the cheque to Rugby that even-

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ing; it is received by one of the partners, who deposits it in his house for safe custody for the night; and in the morning it is received into the bank among the assets of the bank in the ordinary way. Was this a reasonable proceeding on the part of the plaintiff? I think that he was entitled to employ a banker for the purpose for which he did; that he was not bound to incur the inconvenience of carrying the cheque to his own house in the country, where it might be exposed to various hazards to which it might not be exposed at a banker's. If he had sent it to a great distance, the case might be different; but the bank at Rugby was not at an unreasonable distance, and I think that the plaintiff, in sending it there, took a reasonable course—a course which the party who delivered the cheque was bound to suppose not improbable. The banker, having received it, would have a reasonable time for presenting it, according to the distance of his residence and the custom of business. He inquires in the morning as to the best mode of sending it to Lutterworth, and finds the best to be by post. He puts it in the post-office, and sends it to the bankers themselves upon whom it is drawn, with directions to transmit the money to London.

This mode of presentation is not unusual amongst country bankers. What might have been the effect as between the plaintiff and the parties who delivered the cheque to him if the Lutterworth bankers had kept their shop open the whole of the 22nd April, and not performed the commission given to them to transmit the money to London. I do not say: that might have placed the plaintiff in considerable difficulty. The actual state of things, however, is this—that, before two o'clock on that day, the ordinary banking hours extending to four o'clock, the bank stops, and circulars are sent to announce that fact. I am of opinion that the Rugby bankers had the whole of that day for the purpose of presenting the cheque, and that they had it not only for their

own, but the plaintiff's protection. I think, that, under the circumstances, the mode of presentation was reasonable, and that the Rugby bankers acted with due diligence. I must hold that the plaintiff's debt is due.

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THE plaintiff consenting to have his bill treated as a bill on behalf of himself and all other the creditors of Richard Wallin, inquire who are the children of &c. [*the devisees*]; and all such children are before the Court, declare that the plaintiff is entitled to a lien on the estate in the pleadings mentioned for the unpaid purchase-money and interest. Take an account of what is due for purchase-money, and interest at the rate of *£4 per cent. per annum*. Take the usual account of the testator's personal estate; and, if the personal estate is deficient, the usual inquiry as to his real estate, and in what mode it will be for the benefit of all parties interested in his estate that the plaintiff's debt should be raised, &c.

BURY v. ALLEN.

DR. ALLEN, who conducted an establishment at High Beech, in the county of Essex, for the cure and treatment of insane persons, agreed, in February, 1842, to take the plaintiff George Bury into partnership with him. Accordingly, certain articles of partnership, headed "Instructions for Articles," dated the 15th February, 1842, were drawn out, and subsequently signed by the parties. These articles contained, amongst others, the following provisions:—

That the partnership should commence as from the day be founded on the articles. The articles are signed, the first instalment of the premium is paid, and the parties enter into partnership. After the lapse of a few months, A., under considerable provocation from B., excludes B. from the partnership. The connexion is not renewed, the deed is not executed, nor is the second instalment paid; but there is a formal dissolution of the partnership on a certain day. A. afterwards becomes bankrupt:—*Held*, that, in the accounts to be taken between A.'s assignees and B., the latter is to be credited with the whole amount of premium, but to be debited with the unpaid instalment, and with an additional portion of premium, calculated with reference to the actual duration of the partnership.

Held also, that B. is entitled (without prejudice to any question) to enter a claim for the whole premium under the bankruptcy.

One of two partners may have a demand against the other for compensation, in the nature of unliquidated damages, and enforceable in equity only.

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Dec. 13th,
16th.
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A. agrees to take B. into partnership with him for fourteen years, in consideration of a premium of £2500, one half of which is to be paid at the signing of the articles, and the other half at the time of the execution of a deed of partnership to

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of the date thereof for fourteen years: that the plaintiff should pay to Dr. Allen a premium of £2500, for an equal moiety or share in the business, one half of such premium to be paid in cash, on the signing of those minutes, and the remaining half within two months from the day of the commencement of the partnership: that a valuation should forthwith be made by two competent persons, and, in case of difference between them, by an umpire, of all and singular the household furniture and effects then in use in and about the premises of the establishment, and also of all the horses, carriages, carts, cows, oxen, sheep, growing crops, stores, live and dead stock, and all other the effects then belonging to Dr. Allen, and used by him in carrying on the establishment, with certain specified exceptions: that so much of the said valuation as should consist of household stores, wines, spirits, provisions, and the like stock, should be considered as so much money brought in by Dr. Allen, and the moiety thereof be paid or accounted for by the plaintiff to Dr. Allen by equal instalments at three months and six months from the date of those articles: that the plaintiff should pay to Dr. Allen one moiety of such valuation, exclusive of stores as aforesaid, by equal instalments at six, twelve, eighteen, twenty-four, thirty, and thirty-six months from the 25th day of March, 1842, with interest at the rate of £5 *per cent. per annum* from the said 25th day of March: that a fair annual rent, to be fixed by arbitration, should be paid by the co-partnership to Dr. Allen for the use of the premises: that the capital should consist of the stock in trade comprised in the said valuation, and of the sum of £500 in cash, such cash to be brought in by each of the said parties, in equal shares, on the 25th day of March then next: that Dr. Allen should pay and clear up all outgoings of every kind up to the 25th of March, the plaintiff allowing, at the first settlement, one half-quarter of all rates, taxes, salaries, and wages; after which all out-

goings, and the rent, to be fixed as aforesaid, should be paid out of the co-partnership funds: that proper books of account should be kept, &c.: that a banker's account should be opened, and that all monies received should be paid into the bank, and no payments of £5 or upwards should be made but by cheques on such bankers: that the plaintiff should reside constantly on the establishment, and should devote the whole of his time and energies to the promotion and benefit thereof, and in consideration thereof he should live rent-free, and be allowed board and lodging and washing for himself, family, and servants: that, for the first twelve months of the co-partnership, Dr. Allen should continue to reside in his then residence in the establishment rent-free, and be allowed board, lodging, and washing for himself and servants: that the accounts should be balanced quarterly, and each party should thereupon be at liberty to draw out his share of the profits actually received and lying at the banker's over and above £500 cash in hand, to be reserved: that the articles should contain the usual clause of reference of all disputes and differences to arbitrators, and such other formal and usual clauses, for carrying the intention of the parties into effect, as the solicitors for the respective parties, or, in case they should differ, as some counsel, to be nominated by them, should consider necessary and proper.

Under these articles the plaintiff and Dr. Allen entered into partnership on the 15th February, 1842; and some time between that time and April, the plaintiff paid to Dr. Allen the sum of £1250, being one moiety of the premium agreed to be given by him for his admission into the partnership.

In April, 1842, the draft deed of partnership was prepared. It was considered, that, by the last clause in the articles, it was competent to the parties to vary the details of their agreement. It was accordingly (in pursuance of the advice of counsel acting for both parties) expressed in the draft, that the valuations, which by the articles were to

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be made at a future time, had been already made, and that their amount had been fixed at £——. It was also expressed that the remaining instalment of £1250 would be paid, not on the day mentioned in the articles, which had gone by, but “on the day of the date of these presents.”

The arbitrators having differed as to the valuation of the property and of the rent, the execution of the deed of partnership was delayed, and the remaining instalment of £1250 was not paid. In the meantime disputes arose between the partners themselves, the plaintiff complaining that Dr. Allen had received sums of money to a large amount, which he had not paid to the bankers of the concern; Dr. Allen, on the other hand, admitting this, but stating that all the monies so received had been applied to the purposes of the establishment, and that this had been unavoidable, by reason of the plaintiff's delay in paying the further instalment of £1250.

In relation to this subject, Dr. Allen wrote the following letter to the plaintiff:—

“ July 26th, 1842.

“ My dear Sir,—There certainly are several accounts recently received which I have not paid into the bankers, and it is with extreme regret I found myself obliged to adopt such a course. You were, however, perfectly aware that I was in want of money, and the cause; and if you had paid me the sum agreed at the time I had a right to calculate upon, there would have been no necessity for my doing so. You may rest assured that all is going on well with me, and as soon as you pay over what is due to me, every thing will be done on my behalf to your satisfaction.

“ I am, my dear Sir,

“ Yours faithfully,

“ MATTHEW ALLEN.

“ To George Bury, Esq., High Beech.”

Other disputes had also arisen, prior to the date of this letter, of this nature: Dr. Allen complained that the

plaintiff and his family did not, according to the terms of the agreement and express understanding of the parties, reside in the establishment, but nevertheless received from it the advantage of stores, provisions, &c. The plaintiff, on the other hand, complained of want of proper accommodation, and of the temper, and, as he alleged, somewhat coarse habits, of Mrs. Allen in regard to drinking, &c. Allusion is made to this last matter of complaint (which, however, was not satisfactorily proved) in the following entry, which was made by the plaintiff in a sort of journal kept at the establishment:—"Saturday, 30th July, 1842. Dr. Allen went to town in the morning.—Mr. L—— and Mr. B——, each with an attendant, was taken out for a walk.—Letter from Mr. Noble giving the award of Mr. Gadsden. *

* * * Mr. L—— and Mr. S—— took supper with me; and after supper, the servants wanting me down stairs, I went into the hall, whence I was called by Mrs. Allen, who said Dr. Allen wanted me. When we entered the parlour, Dr. Allen sat down, and in the most intemperate manner began to rebuke me for what I had told Mr. Solly and Mr. Bischoff with respect to Mrs. Allen, on the authority of Mr. Stockdale, Dr. Allen's own nephew, and upper servant for many years; Mr. Joseph Nelson, his late clerk, and others in the establishment, having named to the gentlemen before mentioned the source whence my information was derived; and I believe that I also stated to them my suspicion, that, from what I had myself witnessed on two separate occasions, there was some foundation for the information in question. I at once gave up that authority to Dr. Allen, as I had done to Mrs. Allen in a conversation I had with her on the morning. After a pretty sharp volley of fiery words and a tenfold more fiery manner from Dr. Allen, he exclaimed, that, if he was a man of the world, he would shoot me, with direful loud voice and fierce gesture. To my cool reply of 'Try it, old man,' he responded by raising up on high a great bludgeon that

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he had brought with him with the intention of striking me, and perhaps killing me in a less polite way than shooting me. Mrs. Allen came to the rescue most fortunately, and thus my poor body was preserved whole, intact, and unmaimed. After the extreme violence of the fracas, Mrs. Allen began to vaunt about her great exploits and character, upon which I told her that her character was well known."

In consequence of this entry, Dr. Allen excluded the plaintiff from the establishment in the manner which afterwards appears, whereupon the plaintiff, on the 17th August, 1842, filed his bill against Dr. Allen, praying the dissolution of the partnership, the return of the premium, and for an account of the partnership dealings and transactions, an injunction, and receiver.

Dr. Allen, by his first answer to the bill, after setting out the above-mentioned entry, stated, that, after reading it, (which he did on the 1st August, 1842, after his return from London), he took possession of the journal or book in which it was written; and he admitted, that, upon the plaintiff sending for it the same evening, he the defendant refused to give it up. He then stated, that on the following morning the plaintiff again demanded the journal, and threatened to send for a policeman and have him the defendant taken up for felony, if he should refuse to deliver it, which he the defendant, however, refused to do, and the plaintiff thereupon actually went and brought a policeman with him to the establishment; but the defendant feeling he ought not, and could not, any longer submit to such conduct on the part of the plaintiff, and that he owed it as well to the inmates as to himself to exclude the plaintiff from any further interference in the establishment, ordered the servants to fasten the doors against him, and refuse him admittance, which upon his return with a policeman was accordingly done.

In a subsequent part of the answer the defendant "admits, that, for the reasons and under the circumstances herein appearing, and inasmuch as the said establishment is

the sole and absolute property of defendant, he the defendant does persist in refusing to admit the said plaintiff to enter on the premises where the said establishment is carried on, or to see the patients, or to take any active part in the affairs and business of the said establishment, and that the defendant hath, for the reasons and under the circumstances aforesaid, given orders to the servants of the said establishment to shut the doors of the said establishment against the said plaintiff whenever he might apply for admittance thereto. Believes that the said plaintiff has applied for and been refused admission to the said establishment, and that the doors thereof have been, and the same were, for the reasons and under the circumstances aforesaid, on the 9th of August, 1842, locked, and the same were afterwards for a time kept locked, against the said plaintiff. Believes that the servants of the said establishment have stated, as the fact was, that, in shutting the doors and excluding the plaintiff from the said establishment, they acted under the orders of this defendant, which he submits he was fully justified in giving."

After the filing of this answer, and of an answer to the bill as amended, the plaintiff and defendant, in July, 1843, joined in publishing in the Gazette a notice of dissolution of the partnership as from the 1st of that month. And in December, 1843, after such further proceedings had in the cause as are more particularly referred to in the judgment in this case, Dr. Allen became bankrupt, whereupon a supplemental bill was filed against his assignees, praying the benefit of the original suit and proceedings against them, and that, in the decree to be made in the suits, regard might be had (if necessary) to the notice of dissolution, and the change in the rights of the parties thereby.

Upon the causes coming on for hearing, an objection was taken on the part of the defendants the assignees, that the evidence taken for the plaintiff in the original suit could not be read against them. It appeared that

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one witness had been examined for the plaintiff before the bankruptcy, and other witnesses after the bankruptcy, and after issue had been joined in the supplemental suit.

Mr. *Swanston*, in support of the objection, contended, that, as there was no order in a case of this nature analogous to the order of revivor in the case of a suit becoming abated, the proper course for the plaintiff would have been to have obtained an order that the depositions taken in the original suit should be used in the supplemental suit. Without such an order, he contended that the depositions taken for the plaintiff could not be read against the assignees. He cited *Hichens v. Congreve (a)*.

The *Vice-Chancellor* said, that he was not aware that such an order as that suggested was within the course of practice.

The defendants' counsel observed, that, according to another report of the case of *Hichens v. Congreve (b)*, the evidence taken in the original cause, after issue joined in the supplemental suit, had been admitted.

The case stood over for several days, for the purpose of obtaining a certificate as to the practice. The objection, however, was ultimately withdrawn.

Upon the merits of the cause, two points were argued: first, as to the costs of Dr. Allen's appearance on the hearing (c); and, secondly, as to the plaintiff's right to recover the premium, or a part of the premium, which he had paid for his admission into the partnership. Upon the latter point—

Mr. *Simpkinson* and Mr. *Heathfield*, for the plaintiff, ob-

(a) 4 Sim. 420.

(b) Mont. 225.

(c) Dr. Allen died before the

conclusion of the argument on the merits. See post, p. 601.

erved, that the partnership had been dissolved by the act of Dr. Allen, independently of his bankruptcy. The question, therefore, was, whether the defendants were not bound to admit, as an item in the partnership account, the demand of a return of some part of the premium: *Newton v. Rowse* (a), *Therman v. Abell* (b), *Tattersall v. Groote* (c), *Hamil v. Stokes* (d), *Ex parte Sandby* (e).

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Mr. *Swanston* and Mr. *Daniel*, for the defendants.—The character of this establishment was of a domestic nature. It was essential that the keepers of it should reside there with their families; and it is clear, that the residence of the plaintiff was a principal motive with Dr. Allen in taking him into partnership. The plaintiff, however, did not comply with the terms of the agreement as to residence. His conduct, also, in July, 1842, in reference to the entry, was most unjustifiable. If, therefore, the partnership was dissolved before the bankruptcy, that was as much a consequence of his own acts as the acts of Dr. Allen; so that, independently of the question of bankruptcy, he would not be entitled to recover the premium; *Hale v. Webb* (f); and if, independently of bankruptcy, he had no such right, bankruptcy would not give it him: *Akhurst v. Jackson* (g). But, admitting that the plaintiff might have had some claim against Dr. Allen in respect of the premium, had bankruptcy not intervened, it is impossible, under existing circumstances, that the Court should give effect to his claim. The demand consists, not of any alleged debt, but of unliquidated damages. It is impossible to say what amount of damages (if any) had been sustained when the fiat was issued; and if so, the demand is not capable of proof under the bankruptcy: *Boorman v. Nash* (h).

(a) 1 Vern. 460.

(b) 2 Vern. 64.

(c) 2 B. & P. 131, 135.

(d) *Daniel*, 20; 4 Price, 161; Wils. Ex. R. 139.

(e) 1 Atk. 149.

(f) 2 Bro. C. C. 78.

(g) 1 Swanst. 85.

(h) 9 B. & C. 145.

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In order to prove a claim arising out of damages, the data upon which the calculation of the value of the claim proceeds must be so settled as to admit of no dispute, and render the intervention of a jury unnecessary: *Green v. Bicknell* (a). In *Ex parte Broome* (b), which was a case of fraud, a partner was allowed to enter a claim in respect of the whole premium against his co-partner; but it appears that he was not allowed to prove with the separate creditors. Upon the whole, it is submitted, not only that the plaintiff has no right of proof under the bankruptcy, but that, even before the bankruptcy, he had no right to insist, as against Allen, that the premium, or any part of it, should form an item in the account. The prayer of the bill is inconsistent in asking a return of the premium, and that the partnership accounts may be taken. The premium is a matter antecedent to the partnership, and not a matter involved in the partnership account, and the return of it is properly enforceable by action: *Rawson v. Samuel* (c), *Venning v. Leckie* (d), *Gale v. Leckie* (e).

Mr. *Simpkinson*, in reply.

In the course of the argument, the *Vice-Chancellor* sent for the Order Book in Bankruptcy, which contains the statement of the proceedings in *Ex parte Broome*. His Honor, after perusing the order as there set out, said, that he could find nothing in it which corresponded with, or was analogous to, the words "but not to prove with the separate creditors," contained in the judgment as stated in the report (f).

(a) 8 Ad. & Ell. 701.

(b) 1 Rose, 71.

(c) Cr. & Phill. 161.

(d) 13 East, 7.

(e) 2 Stark. 107.

(f) Order Book, 1810, No. 124, pp. 151, 152. "I do further

order, that the said R. Broome be at liberty to go before the said commissioners and prove such debt under the said commission as he shall be able to substantiate, and be admitted a creditor for what he shall be able to

THE VICE-CHANCELLOR.—In this cause, which is by original and supplemental bills, the sole plaintiff is Mr. Bury. The only defendant originally was Dr. Allen. After the original bill (filed 17th August, 1842) had been answered and issue joined, and one witness examined, Dr. Allen, in the latter part of the year 1843, became bankrupt. The supplemental bill was filed against the assignees under the bankruptcy. They answered, and issue having been joined with them, other witnesses were then examined; the irregularity, if any, in the depositions has been waived, and all the depositions have been read by consent. The assignees have not, nor has Dr. Allen, entered into any evidence, but the plaintiff has given certain admissions which have been used.

The suit relates to a partnership which existed between the plaintiff and Dr. Allen in the superintendence, management, and proprietorship of an establishment for the reception and care of insane and nervous patients. Each was an acting partner. The partnership commenced in the early part of the year 1842, and continued down to and throughout July of that year. On the 1st or 2nd of August, 1842, after a quarrel between Dr. Allen and the plaintiff, on the preceding Saturday, and a certain entry made by the plaintiff and seen by Dr. Allen in a particular book, Dr. Allen excluded the plaintiff from the manage-

prove, and be paid a dividend or dividends, in respect thereof, rateably and in equal proportions with the rest of the creditors of the said bankrupt seeking relief under the said commission, but so as not to disturb any dividend or dividends already made under the said commission; but if the said R. Broome shall not be able to make a proof under the said commission, let him be at liberty to make and enter a

claim under the said commission. And I do order, that the costs of both parties be reserved until after the choice of assignees before directed, and also until after the said R. Broome shall have gone before the said commissioners to make a proof or a claim under the said commission; when any of the parties are to be at liberty to apply to me in relation to the matters in question as they shall be advised."

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ment, and from the property and concerns, of the partnership.

The original bill having been filed, as I have said, on the 17th of the same August, an order was made in the cause on the 22nd of that month, to this effect: [His Honor here stated the order, whereby it was referred to the Master to appoint a proper person to collect and get in the outstanding debts of the partnership, and either party was to propose himself to be such receiver without salary, and the defendant Dr. Allen was to be preferred, upon producing proper sureties, and in the meantime he was to be restrained from collecting the partnership debts, &c.] Under this order Dr. Allen was appointed receiver. Afterwards, on the 31st of January, 1843, another order was made thus: [His Honor here stated the order, whereby, the defendant undertaking to put in his answer within three weeks, to facilitate the proceedings in the cause, and to consent to an order for setting down the cause for an early hearing, and to concur with the plaintiff in signing an advertisement for the immediate dissolution of the partnership if the plaintiff should require the same, the said advertisement to be without prejudice to the question whether the said partnership was or had been ever, and when, dissolved, it was ordered that the defendant Dr. Allen should be continued the receiver, &c.] Some of the expressions of this order, as drawn up, are certainly not attributable to me. Early in July, 1843, before the bankruptcy, the plaintiff and Dr. Allen inserted in the Gazette a formal advertisement of the dissolution of their partnership. But the accounts of it have not been taken. They remain unsettled.

A decree under these circumstances for taking the partnership accounts is of course; and in effect but two matters have been argued—the only two indeed, upon which, at the present stage of the cause, any difference has or reasonably could have arisen. The first was as to Dr. Allen's costs since the service upon him by the plaintiff of a

subpœna to hear judgment, so far as they were occasioned by that *subpœna*; the second as to a sum of £2500, to which I shall presently advert.

With regard to the first, I think that Dr. Allen, after the choice of assignees, and after the supplemental bill filed against them had been answered, having been served with a *subpœna* to hear judgment, was justified in attending to it and appearing at the hearing. I need not, however, nor perhaps ought, to give an opinion as to his title to costs, subsequent to that service; for I am informed, and I suppose correctly, that Dr. Allen's death has happened since the commencement, but before the conclusion, of the argument, and that there has not been, nor is intended to be, any revivor in consequence.

With regard to the £2500, the matter stands thus: the establishment and business were originally those of Dr. Allen alone. Desirous of having a partner, he treated on the subject with the plaintiff, and the treaty produced an agreement which was the basis of the partnership already mentioned. The terms of the agreement were committed to writing, and the writing was signed by them before July, 1842. It bears the date of 15th February in that year, and the parts of it material for the present purpose are these: [His Honor here read the material parts of the agreement. See *ante*, p. 590.] Any more formal or farther instrument has never been executed or signed. The valuations that were to be made were, if not completed, very nearly completed before the end of July, 1842. A moiety of the £2500 was paid by the plaintiff to Dr. Allen before the commencement of that month. The other moiety has never been paid, though some other payments have been made to him or to the partnership, or to both, by the plaintiff. They inserted, in July, 1843, as I have said, an advertisement in the Gazette of the dissolution of their partnership. This was done by arrangement, and without prejudice to the question whether it had been earlier dissolved. The parties, by their

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counsel, on a day in December last, during the hearing of the cause, agreed that the dissolution should be considered and treated as having taken place upon and from the 1st of July, 1843, but not sooner. This last agreement I view as meant to regulate the ordinary accounts merely, without prejudicing or affecting any question as to the £2500. The assignees assert, and the plaintiff denies, that the unpaid moiety of this sum ought to be paid by him to them. He asserts, and they deny, that a proportion of the other moiety of it should be returned to him, that is, should be credited to him in taking the accounts; and they say, that, if the plaintiff had ever any claim in this respect, it was only against the bankrupt personally; to which the bankrupt objected, and the plaintiff does not assent.

These conflicting claims render it necessary, I think, to consider the origin and circumstances of the separation between the partners—of the exclusion of one by the other.

It appears that the plaintiff kept at the establishment a book which may or may not have been strictly a partnership book, but in which he made entries from time to time relating to the patients, and to transactions concerning the partnership business, and which certainly was open to Dr. Allen's inspection. In this book, the plaintiff, on Saturday the 30th, or Sunday the 31st of July, 1842, made the following entry, to which I have already referred: [His Honor here read the entry. See *ante*, p. 593.]

It is admitted that the altercation, stated in this entry to have taken place on the 30th of July, 1842, did take place. There is, however, no other evidence of it, so far as I am aware. The entry, which was first seen by Dr. Allen on the 1st August, 1842, is in evidence. Now, as the dispute is there described, it was commenced by Dr. Allen, not by the plaintiff, against whom Dr. Allen and Mrs. Allen may or may not have had cause of complaint and remonstrance. That is a different question. The

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quarrel, having thus begun, proceeded intemperately on the part of Dr. Allen certainly,—perhaps on the part of the plaintiff also. I have not, however, been able, from the materials before me, to gather sufficient reasons to justify Dr. Allen in the exclusion to which he resorted—in the course which he took; considering, especially, what by the entry the plaintiff is represented as having said, and some portions of the oral testimony. That the plaintiff had acted indiscreetly before the dispute, I believe, or think probable; that he did not conduct himself discreetly during the dispute, is also to be inferred; and that the entry itself, its terms, and the manner of it, are to be regretted and disapproved, it is impossible to doubt. But it does not strike me that he alone was in error; and, it being remembered that Dr. Allen had received from the plaintiff, on account of the £2500 for admission into the partnership, so large a sum as £1250, I cannot, upon the whole, I repeat, think, that the mode of proceeding adopted and pursued by Dr. Allen, considered, at least, as the conduct of a man not abandoning his claim to the £1250 unpaid, and to part of the £1250 paid, was justifiable. It is said, that, independently of the entry, the quarrel set down in it, and the matter or alleged matter which was the assigned cause of that quarrel, there had been causes of complaint against the plaintiff. If there were any such, they appear to me to have not been weighty; to have never been treated or considered by Dr. Allen before the quarrel of the 30th of July as grounds for determining the connexion between them; and to have been (if there was anything to waive or forgive) waived or forgiven before the quarrel. This is shewn by Dr. Allen's letter of 26th July, 1842, as well as otherwise. Substantially, from the 1st or 2nd of August, 1842, the exclusion of the plaintiff by Dr. Allen was complete. Substantially, from one of those two days, Dr. Allen re-possest himself of the concern. His first answer contains these passages: [His Honor here read

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certain passages from the answer, which have been, in substance, stated. See *ante*, p. 594.]

On the whole, I think, that, had Dr. Allen not become a bankrupt, he would, under the particular circumstances of the case, have been precluded from demanding any farther portion of the £2500, and compelled by this Court to refund, that is, to be debited in the accounts with a proportion of the £1250 paid. Does the bankruptcy make any difference as to the accounts? that is, can the assignees reject that debit and claim credit for the unpaid £1250?

As to the latter, their rights cannot of course stand higher than those of Dr. Allen. As to the former, I have attended to what has been said in argument on the subject of cases of unliquidated damages, and to the authorities that have been cited. Whether there is any sense in which, or purpose for which, the plaintiff's demand in respect of the paid £1250, under the circumstances belonging to it, could be termed properly a demand for unliquidated damages, I do not think it necessary to express an opinion. I may, however, observe, that, though the notion of unliquidated damages is generally connected with the notion of an action at law, and though I do not say whether, in my judgment, at any time between the 29th of July, 1842, and the bankruptcy, any action could or could not have been brought successfully by the plaintiff against Dr. Allen, it is, I apprehend, plain, that one of two partners may have a demand against the other for compensation, substantially in the nature of unliquidated damages, enforceable in equity, and in equity only. Suppose the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interests, in breach of his duty to the partnership: whether at law compellable, or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect. Suppose the partnership dissolved; that matter must form, I conceive,

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an item in the accounts to be taken. Suppose his bankruptcy, preceded or not preceded by a dissolution, the accounts, however, not taken:—suppose the amount or extent of loss or damage, occasioned by the conduct assumed to have taken place, not at the time of the bankruptcy to have been compensated or ascertained, or become capable of ascertainment, but afterwards to have become capable of ascertainment and been ascertained—is it to be struck out of the accounts between the assignees and the other partner?

In the present case, there are accounts, partnership accounts, in any event necessarily to be taken; accounts involving mutual demands. The demand now under consideration was, as well as the accounts generally, the subject of the present suit before the bankruptcy. The suit was at issue before the bankruptcy. If this disputed item of debit was or would have been a proper item in the accounts between Dr. Allen and the plaintiffs, independently of the bankruptcy—if, independently of the bankruptcy, Dr. Allen could not have claimed anything from the plaintiff in respect of the matters in question without satisfying his demand in respect of the £1250 paid, as I think Dr. Allen could not,—can the accounts now with justice or propriety be taken without this item? Is the 50th section of the stat. 6 Geo. 4 to be disregarded? Why should this matter not be considered to be within it? The analogy suggested between the present case and those where a return of premium or relief upon that footing is sought, by reason of a partnership having been terminated by a bankruptcy,—the partnership having subsisted without disturbance down to the bankruptcy,—does not, in my judgment, exist, or at least is very far from perfect. But I give no opinion how the matter would have stood had there been no exclusion, no separation, no dispute before Dr. Allen's bankruptcy, or had the exclusion, the separation, and the dissolution taken place before the bank-

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ruptcy under circumstances materially different from those which appear to have existed in fact.

As the case actually stands—considering that, whether the plaintiff was or was not free from blame, the exclusion of him, and the resumption of the sole possession and dominion of the business and establishment by Dr. Allen were, I think, complete, and in effect final, and, circumstanced as they were, unjustifiable—considering, I repeat, that, from the time of the exclusion, that is, from the 1st or 2nd of August, 1842, Dr. Allen continued to prevent the plaintiff from using or exercising the rights of a partner—considering the dissolution which followed, and must be treated as connected with that exclusion, and must be referred to it—considering that all this was before the bankruptcy—that the original suit, and particularly Dr. Allen's first answer, were such as they were, and that the cause had reached before the bankruptcy the stage which it did reach before the bankruptcy,—the Court is, I think, bound to declare, that, in the accounts to be taken between the assignees and the plaintiff, he is to be credited with the £2500 mentioned in the agreement, but debited, on the other hand, with the £1250 unpaid; and besides, with such a sum as bears the same proportion to the whole £2500, as the time from the commencement of the partnership to the 1st of July, 1843, inclusive, bears to the whole term of fourteen years mentioned in the agreement. I think the measure of time in this cause the only practicable and the proper measure, though I have not failed to consider the remarks on that view of the case which have been made by the assignees' counsel. Nor have I omitted to observe the power of dissolving at the end of seven years contained in the agreement: that, from its nature and terms, makes, I conceive, no difference.

Any question of interest must, as well as all costs between the plaintiff and the assignees, be reserved. I do not know whether any joint creditors of Allen and Bury

have proved under the fiat. But, as probably all the joint creditors have been or will be paid in full by the plaintiff, or out of the joint estate, some arrangement should be, if none has been, made, to prevent any dividend from being declared in the bankruptcy prejudicially to the plaintiff's rights, whatever they may be. Some claim, I suppose, has been, or ought to be, entered on the proceedings.

I have not forgotten, though I have not alluded to, the reliance placed by the assignees' counsel on the case of *Rawson v. Samuel*, from which the present differs materially in several respects. I apprehend that my decree in this case is not inconsistent with anything decided or said in that by either of the experienced Judges before whom successively it was, or with *Ex parte Eyre (a)*, or *Akhurst v. Jackson*, or *Green v. Bicknell*. It is, therefore, unnecessary to say, and I wish to be understood as not intimating, whether I do or do not dissent from *Green v. Bicknell*. As to the case *Ex parte Broome*, also cited at the bar, I suppose that there a proof in competition with the joint creditors, if any, or to their prejudice directly or indirectly, must have been considered inadmissible; but I am not satisfied that it was Lord *Eldon's* meaning, that, if there was to be any proof at all for the purpose of a dividend, the proof could be otherwise than upon an equal footing as to dividends with the proofs of the general body of separate creditors, supposing the rights of the joint creditors out of the question.

REFER it to the Master to take an account of all the partnership dealings and transactions between the plaintiff and the late defendant Matthew Allen, deceased, from the time of the commencement thereof; and of all monies received and paid by the said plaintiff and the said late defendant Matthew Allen, and by the defendants William Pennell and William Charles Wryghte, the assignees of the said late defendant Matthew Allen, since his said bankruptcy, or by any other person or persons by their order, or for their use respectively, in respect of such co-partnership; and declare, that, in taking such accounts, the said plaintiff is to be

(s) 3 Mont. D. & De G. 12.

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credited with the sum of £2500, in respect of the premium agreed to be paid by him for an equal moiety or share in the business of the said co-partnership, and is to be debited with the sum of £1250, being the moiety remaining unpaid of such premium, and is also to be debited with the further sum of 245*l.* 19*s.* 6*d.*, being the proportionate part of the said sum of £2500, for the period of time from the commencement of the said co-partnership to the 1st day of July, 1843, inclusive. And let the plaintiff be at liberty to go in before the commissioner acting in the execution of the fiat against the said late defendant Matthew Allen, and tender a claim for the sum of £2500, without prejudice to any question.

* * * * *

And let the Master be at liberty to state any circumstances specially as to the several sums of £250, £200, and £300, in the pleadings mentioned to have been paid by the plaintiff to the late defendant Matthew Allen, and otherwise.



Jan. 17*th*,
18*th*.

Specific performance decreed of a parol agreement (in part performed) for surrendering a lease, and granting a new lease, at a reduced rent.

Quære, whether the words "approved by me, J. S.," affixed to certain memoranda by way of approval of an arrangement in which the party is interested, is a signing within the Statute of Frauds.

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THE bill stated, that Hugh Parker the elder, being seised in fee simple of a freehold estate at Woodthorpe, containing beds of coal of great extent and value, by an indenture of lease dated the 3rd January, 1839, and made between himself of the one part, and Hugh Parker the younger, John Rhodes, John Parker, and James Rhodes, of the other part, demised and leased to the parties of the second part, their executors, &c., all those two beds, mines, or seams of coal, commonly called the Upper (or Manor) bed of coal, and the Lower (or Sheffield) bed of coal, lying and being under the several closes mentioned in the lease, to hold to the lessees for the term of forty-two years from the 2nd February then last past, yielding and paying the yearly rent of £630, by two equal half-yearly payments, on the 2nd of August and the 2nd of February in every year, such rent being thus calculated; viz. the sum of £210, part thereof, as the price or value of one surface acre of the Upper or Manor bed, and the sum of £420, residue thereof, as the price or value of one surface acre of

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the Lower (or Sheffield) bed ; and also yielding and paying on the same days a further rent, after the rate of £210 *per* acre for so much coal beyond one acre (if any) of the aforesaid Upper or Manor bed, and a further rent after the rate of £420 *per* acre for so much coal beyond one acre (if any) of the aforesaid Lower or Sheffield bed, which the lessees should have worked and gotten during the half-year for the time being elapsed.

The bill then stated, that, in the spring of 1841, the lessees, who were working the colliery in co-partnership, found that it must be a losing concern to them, unless an alteration were made in the terms of the lease, and that they communicated this to Hugh Parker the elder, who, being fully aware and satisfied of the truth of such statements, verbally agreed to revise the lease, and engaged to give the matter attention, and that he afterwards, acting on the faith of such representations, and being satisfied that the rents were too high, declined receiving from the lessees any part of the half-year's rent, which became due on the 2nd day of August, 1841.

The bill then stated, that, at or about the time during which the negotiation was pending for an alteration of the terms of the lease, John Parker and James Rhodes became desirous of retiring from the partnership, and it was accordingly arranged between them and their co-partners, with the knowledge and sanction of Hugh Parker the elder, that the partnership should be dissolved so far as related to John Parker and James Rhodes. That this arrangement was carried into effect by a deed of dissolution, bearing date the 27th July, 1841 ; and by such deed the remaining partners, Hugh Parker the younger, and John Rhodes, who were plaintiffs in this suit, jointly and severally, covenanted to indemnify John Parker and James Rhodes against the rents and covenants of the lease.

The bill then alleged, that the lessees, having previously to such dissolution consulted Hugh Parker the elder as to the terms of the lease, and the said Hugh Parker hav-

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ing frequently expressed his willingness and intention to revise and alter the terms of it, the plaintiffs, fully relying on such promise, were induced to take the shares of John Parker and James Rhodes in the said colliery, and to enter into the aforesaid covenants to indemnify.

The bill further alleged, that, after the dissolution, the said colliery was carried on by the plaintiffs, who from time to time pressed the said Hugh Parker the elder on the subject of the lease, as well by themselves as by their solicitors, and that the said Hugh Parker frequently stated he was perfectly satisfied it was right to carry his promise into legal effect; and that, in the month of September, 1842, Jonathan Rhodes, an experienced collier, the father of the plaintiff John Rhodes, at the request of Hugh Parker the elder, gave his opinion as to the value of the coal, by letter addressed to the said Hugh Parker.

The bill then stated the following letters:—Plaintiff John Rhodes to Hugh Parker the elder.

“ Spring Wood Cottage, 28th Sept., 1842.

“ Dear Sir,—I hope you will not think me troublesome in calling your attention to a subject connected with the colliery, which has been in agitation some length of time, viz., the new adjustment of coal rent which you had yourself proposed some time ago. It is my father’s impression, as well as my own, that now is the time to have that matter settled; and we cannot suggest a better plan, should such meet your approbation, than that Mr. Jeffcock be allowed to report upon it, &c.

“ Your obedient servant,

“ JOHN RHODES.”

Hugh Parker the elder to Mr. Haywood, the plaintiff’s solicitor:—

“ Dear Sir,—I have considered old Mr. Rhodes’s letter about the coal rent. Although I fear that there is no doubt that the rent first agreed upon, before the depression of times came on, was too high, still I cannot but

think old Mr. Rhodes has taken a view founded too much on the present depressed state of things. I am, however, desirous that an equitable arrangement should be made, and I agree to refer the future terms of rent to Mr. Thomas Jeffcock, according to the proposition of Mr. John Rhodes, whose letter to me of the 28th of September I now enclose.

“ I remain, dear Sir, very truly yours,

“ H. PARKER.”

“ Woodthorpe, Oct. 29, 1842.”

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The bill then stated, that Mr. Haywood, acting on behalf of the plaintiff, consented to the proposal contained in the last-mentioned letter, and shortly after the receipt of it, delivered it, together with the letter of John Rhodes of the 28th September, 1842, to Mr. Jeffcock, with instructions to act upon the same. That Jeffcock, who was an experienced colliery viewer, proceeded to view the colliery, and on the 24th November sent to the plaintiffs and to the said Hugh Parker a report in these terms:—“ Gentlemen, —Mr. Haywood, solicitor, Sheffield, having placed in my hands letters signed by Hugh Parker, Esq., and Mr. John Rhodes, on behalf of the Woodthorpe Coal Company, appointing me to fix a rental *per* acre on the coal, &c. I have come to the following decision. Manor seam.—That all the coal to the bassett of the top level or horse gate be after the rate of £125 *per* acre, and that the remainder to the deep of the top level be after the rate of £150 *per* acre. Sheffield seam.—That this seam of coal be after the rate of £300 *per* acre. I have now acted up to the power vested in me, &c. However, having had conversation with the parties interested in the present lease, I would, with due deference, suggest an alteration as to the mode of payment as follows:—That £300 be paid as a certain rental *per annum* for the Manor seam, and if a greater quantity of coal be got above the value of £300, to be paid after the rate of £125 or £150 *per* acre, as the case may be. That the rental of the Sheffield seam shall

THESE TWO ARE THE ONLY TWO WHICH I RECEIVED AND THAT I
WAS THE ONLY ONE OF 1900. IF THE OTHER TWO WERE NOT PAID
AT THE END OF THE YEAR I WOULD BE ABLE TO SHOW THE
VALUE OF 1900 AS THE ONLY TWO WHICH I RECEIVED THE YEAR OF 1900
AT THE

The bill was passed by Mr. Jackson had made
in 1807 and in the 10th day of November 1842, a re-
solution was adopted and they agreed to the plan.
The House resolved it passed and the principal High
Court, the bill was passed was in these terms, viz:—
“Resolved, That if two acres of land be to be
sold and the said land be sold at auction, one acre of each
of the two lots shall be sold and the money to be paid
if according to the said land, Sheffield Bed
£10. The said bed is the best of present value £135, below
present price £150. Therefore it is Resolved.” John Rhodes.”
That on the same 10th November the principals respectively
signed the following declaration on the same sheet of
paper on which the last mentioned declaration was writ-
ten, viz:—“I we do not within two years from Lady-day,
1843, commence mining in the area of Sheffield bed of coal,
we will render ourselves liable to pay for an additional acre
if the mine be such as to work the lower bed. John Rhodes;
Hugh Parker; and” and that the said Hugh Parker the
said signed with the said declarations immediately af-
terwards in manner following, that is to say, “approved
by me H. Parker.”

The bill then passed, and after these memorandums had been duly signed in manner aforesaid, and on the 5th December, 1842, Hugh Parker the elder wrote and sent to said Mr. Jefferson a letter of that date in these words:—

“ Dear Sir,—I have had conversation with Mr. Rhodes since you sent in your report, and he has sent me the observations I enclose. He agrees to the terms you have mentioned for the future rents to pay for two acres of the Manor bed; but, after he sinks to the lower bed, he does not like to be bound to pay for two acres of each bed, but

proposes to pay for one acre of each, but for a greater quantity if gotten. I do not know that it would be to the disadvantage of the lessor to covenant to have the rents so fixed, because I think it would not answer the purposes of the lessees to go down to the lower bed and get so small a quantity as an acre. Please to consider Mr. Rhodes' observations.

" I remain yours truly,

" H. PARKER."

" Woodthorpe, 5th December, 1842."

The bill then alleged, that, shortly after such agreement as aforesaid had been entered into by the plaintiffs and the said H. Parker the elder, a surrender of the said lease of the 3rd January, 1839, was prepared and engrossed, and the draft of a new lease dated 2nd August, 1842, of the said colliery and premises from the said Hugh Parker to the plaintiffs was prepared by the solicitors of the plaintiffs and verbally approved by H. Parker. That, after the said new lease had been thus approved by all parties interested therein, the draft thereof was engrossed ; but that, before the same or the surrender of the former lease was executed, and on or about the 16th January, 1843, a fiat in bankruptcy was issued against the said Hugh Parker, under which he was declared bankrupt.

The bill then, after stating refusals by the assignees under the bankruptcy to carry into effect and specifically perform the arrangement and agreement so as aforesaid entered into between the plaintiffs and the said H. Parker before he became bankrupt, charged that the said new lease to the plaintiffs, and the terms upon which the same should be granted, were definitely settled and agreed upon, *and signed by the said Hugh Parker*, and in the event of the said Hugh Parker not having become a bankrupt, he would have been bound to carry such arrangement and agreement into effect ; and that, on the faith of such arrangement and agreement as aforesaid, and in the confidence that the same would be carried into effect, the plaintiffs have

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continued to work the said colliery on their own account as co-partners, and have expended large sums of money thereon, and are now continuing to work the same as the parties who are solely interested therein. The bill also charged, that, from and after the dissolution of the said partnership, the defendants John Parker and James Rhodes abandoned all benefit under the lease of the 3rd January, 1839; and it was expressly understood and agreed between them and the said Hugh Parker, that from thenceforth the plaintiffs only should be tenants of the said colliery and premises, and that all the interest of the said defendants, John Parker and James Rhodes, should cease and determine, and, as evidence thereof, the plaintiffs charged that the said Hugh Parker wrote and sent to the defendant John Parker a letter dated the 14th September, 1841, in these words:—"As the colliery cannot sustain, with any profit, so large a number of partners, I have arranged with Mr. Rhodes and Hugh that you and James Rhodes shall retire, and that I will accept them, viz., John Rhodes and Hugh as my tenants, releasing you and James Rhodes. Mr. Smith on your part and Mr. Haywood on the part of the Rhodes's have, I understand, prepared the deed of dissolution of partnership, and I have only to add, that I accept Mr. John Rhodes and Hugh as my tenants, and I release you and James Rhodes from the provisions of the lease; and if any instrument of release be thought necessary by you or him, I am ready, whenever called upon by either of you, to execute it at your or his expense. H. Parker, Woodthorpe, 14th September, 1841."

The bill prayed that the said agreement and arrangement made and entered into between the said Hugh Parker and the plaintiffs, and the defendants John Parker and James Rhodes, might be carried into effect by the decree of this Court, and that the defendants, the assignees, might be ordered to accept a surrender of the lease of the 3rd January, 1839, and to release and indemnify the defendants John Parker and James Rhodes from the

covenants therein contained; and that the said John Parker and James Rhodes might join (if necessary) in such surrender, and that the defendants the assignees might be ordered to grant a lease to the plaintiffs of the said colliery and premises from the 2nd August, 1842, for the remainder of the said term of forty-two years, and upon such terms as agreed upon between the plaintiffs and the said Hugh Parker, and for general relief.

The defendants the assignees, by their answer, admitted the existence of the various letters and documents mentioned in the bill, and that they had declined to perform the alleged agreement; but they submitted, that, without the sanction of the Court, they could not relinquish and surrender a valid and existing lease, in which four persons were liable to pay certain specified rents, and sign another lease, at much less rents, to two only of the four lessees. They also submitted, that the offer on the part of Hugh Parker the elder, to accept reduced rents and grant a new lease to two of the original lessees only, was purely voluntary on his part, and without any valid consideration, and, not being completed at the time of the bankruptcy, could not be carried into effect by the defendants, unless under the direction of this Court. They further submitted whether the signing by Hugh Parker the elder of the words "approved by me, H. Parker," at the foot of the memorandums mentioned in the bill, was duly signing such memorandums. They did not, however, by their answer, insist on the Statute of Frauds.

The cause came on for hearing before *Knight Bruce*, V. C., in February, 1844, when his Honor expressed his opinion to be, that the plaintiffs were not then entitled to a decree for relief, neither a sufficient consideration for, nor any act of part-performance of, the agreement, appearing upon the pleadings; but that, as the Statute of Frauds was out of the case, the defendants not having pleaded it, or insisted upon it, and a valuable consideration might

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be proveable by extrinsic evidence; and also that, upon further investigation, acts amounting to part-performance of the agreement, supposing them capable of being material, might possibly appear. And (by consent of the plaintiffs and the defendants other than the assignees, and the assignees not opposing) his Honor directed a reference to the Master to inquire whether, after the granting of the lease in the pleadings mentioned, any, and what, agreement for the surrender thereof, and for granting a new lease of the property therein comprised, was ever, and when, entered into between Hugh Parker the elder and the lessees, or any, or either, and which of them; and whether verbally or in writing, and to what effect, and for what consideration, and under what circumstances; and whether, upon the faith of any, and what, agreement or promise by the said Hugh Parker, any, and what, acts or act affecting or relating to such lease or property was or were ever, and when, done by the said lessees, or any or either, and which of them, &c.

The Master, by his report, found that, in April, 1841, a parol agreement was entered into between the parties, that, in consideration of the lessor, Hugh Parker, accepting a surrender and granting a new lease, the partnership should be dissolved, and the retiring partners indemnified, and that the new lease should be granted to the plaintiffs alone, at reduced rents, to be ascertained by a person to be appointed by the lessor; that this agreement was afterwards varied as to the manner in which the coal should be gotten and the rents ascertained, and that the terms of the original and varied agreement were stated in writing, and contained in a document of April, 1841, and the letters and report and memoranda mentioned in the bill.

In addition to the documentary evidence, the Master had received the affidavit of Hugh Parker the elder, (which was made after he had obtained his certificate), and the affidavits of Mr. Haywood, Mr. Jeffcock, and an-

other person. The document of April, 1841, mentioned in the Master's report, is referred to in Hugh Parker's affidavit.

To this report exceptions were taken by the defendants the assignees, on the ground that there was no agreement for the surrender of the original lease and granting a fresh lease, or, if there was, there was no consideration for such agreement.

The cause now came on for argument upon these exceptions, and also upon further directions.

On this argument, the draft lease which was prepared in pursuance of the fresh agreement was used in evidence. It was dated the 2nd August, 1842, from which date the term of forty-two years was made to commence, and the reddendum was as follows :—"Yielding, &c., unto the said Hugh Parker, his heirs and assigns, during the said term, the following rents, &c., viz. for every superficial acre of coal to be raised and gotten by the said Hugh Parker the younger, and John Rhodes, their executors, administrators, or assigns, from that part or portion of the said upper bed of coal hereby demised, which lies above the level hereinbefore mentioned, the rent or sum of £125, and for every superficial acre to be raised and gotten as aforesaid from that part or portion of the same bed of coal which lies below the said level, the rent or sum of £150, and for every superficial acre of coal to be raised or gotten as aforesaid from the said lower bed of coal hereby demised, the rent or sum of £300, and so in proportion for any less quantity than one acre, which may be raised or gotten as aforesaid from either or any of the said beds or portions of beds; and in case, in any one half-year during the first five half-years of the said term, the quantity of coal that shall have been actually raised and gotten as aforesaid, from and out of the said beds, or either of them, shall not, according to the rates or rents aforesaid, amount to or produce the sum of £150, then yielding, &c., such additional or further sum

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of money or rent as will, with the coal so actually raised and gotten as aforesaid, (if any), amount to and make up the said sum of £150, according to the rates or rents aforesaid; it being understood and expressly agreed, by and between the said parties hereto, that the said Hugh Parker the younger, and John Rhodes, their executors, administrators, or assigns, shall, during the first five half-years of the said term, pay the rent or sum of £300 *per* year at the least, although they shall or may not have actually raised and gotten coal to that amount or value, or any coal whatever." * * * *

Mr. *Bigg*, for the exceptions contended, that there was no consideration to support the agreement set up by the bill and found by the Master. It could not be for the lessor's benefit to have a certain rent of £600 reduced to £300. Neither was it any advantage to him, that two of the partners should undertake the responsibility of the four. On the other hand, that circumstance was no detriment to the two, but an advantage. The colliery was not sufficient to afford a living for the four, and the two did not take upon themselves any engagement to which they were not before liable. The bill did not proceed on the ground of a parol agreement part performed, but on that of a complete agreement signed by the parties. The defendants, therefore, had been deprived of the advantage of pleading the Statute of Frauds, though, if the affidavits relied on by the Master had been stated in the pleadings, it would have been otherwise.

The argument having closed for the day, it was agreed by all parties, on the following morning, at the suggestion of the *Vice-Chancellor*, that the case made and stated by the affidavits of Hugh Parker, Haywood, and Jeffcock, should be considered and treated as made and stated by the bill, and that the answer of the assignees should be

considered and treated as if it had insisted on the Statute of Frauds.

The affidavit of Hugh Parker the elder, after stating that the lessees, after expending considerable sums of money on the colliery, had found the Manor bed to contain coal of very inferior quality, contained the following passages :—" That, having ascertained the state of the said mine, and the state of the said coal, to be as above mentioned, and it having been frequently, and particularly in or about the month of December, 1840, represented to this deponent by the said lessees, (and as this deponent did and does believe to be the fact), that, under such circumstances, the said colliery must be a losing if not a ruinous concern to the said lessees, unless an alteration were made in the amount of rent; he the deponent, in or about the Spring of the year, 1841, promised and agreed with the said lessees to reduce the amount of the said rent, and to revise the terms and stipulations contained in the lease. That he was also desirous that the said John Parker and James Rhodes should retire from the co-partnership, this deponent being satisfied that even with a considerable reduction of the rents reserved in and by said lease, the profits of the colliery would not be sufficient to maintain the families of the said four partners. That he, therefore, proposed and stipulated, that the said partnership should be dissolved, and that the said John Parker and James Rhodes should retire therefrom, and that the colliery should in future be carried on by the said plaintiffs alone; and this deponent at the same time promised, that, in consideration thereof, he would have the said colliery examined by some competent person, with a view of ascertaining the amount to which it would be fair and proper that the said rents should be reduced, and that, upon such reduced amount being agreed upon, the said lease should be surrendered by the said lessees, and that a new lease of the said colliery should be granted to the said Hugh Parker the

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younger, and John Rhodes, at such reduced rents. That his said proposal and stipulation was adopted and agreed to by the said lessees, and it was in consideration thereof agreed and arranged between this deponent and the lessees, that the partnership should be dissolved so far as related to the said defendants, John Parker and James Rhodes, and that the said plaintiffs should take upon themselves all the existing and future liabilities and risks thereof; and thereupon, at the instance and request of this deponent, the said plaintiffs, Hugh Parker the younger, and John Rhodes, drew up certain proposals in writing, in the words and figures following, and sent a copy thereof to this deponent: that is to say,—“April, 1841. Our landlord, Hugh Parker, Esq., having stated, that, in the event of the Sheffield Coal Company not becoming tenants for the Woodthorpe Colliery, we, John Rhodes and Hugh Parker, jun. were to become sole partners, and were to arrange matters regarding future proceedings of said collieries; we, having therefore taken into consideration all circumstances, do agree to the proposal that the Woodthorpe Coal Company shall only consist of two partners, Hugh Parker, jun., and John Rhodes, and do further propose, that each shall have an equal amount of share or shares.” * *

In a subsequent part of his affidavit the deponent stated, that he did, on the 6th December, 1842, in pursuance of his promise made to the plaintiff previous to and as an inducement for the dissolution of the partnership, sign the memorandums mentioned in the bill, by writing at the foot of them “Approved by me, H. Parker.”

Mr. *Bigg*, in continuation.—Assuming that the case now rests on the footing of part-performance, it is clear that the contract was not complete till December, 1842. In that month Hugh Parker signed the memorandums, and he says that he did so in pursuance of his promise made to the plaintiffs before the dissolution of the partnership.

But how can an act done in July, 1841, which was the period of dissolution, be in part-performance of a contract of December, 1842? The acts of part-performance cannot, by any means, precede or be preliminary to the contract: they must, of necessity, arise after the contract is complete: *O'Reilly v. Thompson* (a); and must be so unequivocal in their nature as themselves to raise the inference of the existence of an agreement: *Frame v. Dawson* (b).

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The remaining point is, that the terms of the agreement are not certain. Something *dehors* must be introduced to fix the contract. The head rent is not fixed. All above it is to be "according to Mr. Jeffcock's scale." But Mr. Jeffcock's scale gives two rents, and is an uncertain standard of reference. The engrossment of the release is not part of the documentary agreement, any more than it is part-performance.

Upon the whole—1. There is no valuable consideration to support the agreement. 2. The agreement is not in writing and signed under the Statute of Frauds. 3. There is no part-performance to take the case out of the statute. 4. The agreement is uncertain in its nature. And the case being heard upon further directions and exceptions, the bill must be dismissed.

Mr. *Swanston* and Mr. *Tillotson*, for the plaintiff.

Mr. *Russell* and Mr. *Bacon*, for the defendants John Parker and James Rhodes.

THE VICE-CHANCELLOR.—Notwithstanding the obscurity of this case, having had the benefit of a full and able argument, and having, since the Court rose yesterday, read the bill and considered the case, I am prepared to give an opinion upon it.

(a) 2 Cox, 271.

(b) 14 Ves. 386.

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It occurred to me last night, and the opinion remained this morning, as far as I could entertain an impression without having heard the case throughout, that the probable result would be, that I should find it my duty to dismiss the bill without prejudice to a new suit. If this had been done the consequence would in all probability have been, that within a week a new bill would have been filed, adapted to the circumstances of the case. It was on that account, therefore, though without stating my reasons, that I made the suggestion which I did this morning at the sitting of the Court—a suggestion in which all parties have acquiesced, and, I think, wisely.

[His Honor then, after observing that the counsel who prepared the bill had not been furnished with a statement of the facts as they appeared in the Master's office, and had consequently framed the charges in such a manner as to render it unlikely that they should be met by a plea of the Statute of Frauds, proceeded thus :]

A mere agreement between A. and B., A. being indebted to B., that B. shall take from A. a sum less than the amount of his debt in discharge of his liability, is *nudum pactum*. An agreement between landlord and tenant that the lease shall be surrendered, and a new lease taken, although the only change be an abatement of rent, may stand on a very different footing. Here, according to the bill, there was an agreement on the part of the landlord that the rent should be prospectively reduced, and (without any consideration that I can see, unless you add the letter from Hugh Parker to John Parker, which, however, has no consideration apparent upon it) that two of four partners jointly and severally liable should be discharged from their obligation. If, therefore, this matter rested upon the written documents, I should probably have felt it impossible to give relief, as the bill is framed; and no relief *ultra* the written documents is prayed. The bill, however, is now to be read as

if it made the case stated in the affidavits, including the affidavit of Hugh Parker, part of which I will now read; first observing, however, that Mr. *Bigg's* observation, upon the notion of part-performance of an agreement before the agreement is made, seems well-founded. But the question is, whether, taking Hugh Parker's affidavit as statement only, there is not a valid agreement *stated* anterior to December, 1842. [His Honor here read that portion of Hugh Parker's affidavit, which is included between inverted commas.]

The affidavit states the facts that are agreed upon. In consideration of the promise of Hugh Parker, Mr. Jeffcott surveyed and made his report. His report was agreed to before the bankruptcy. The words "approved by me" were written before that time. Now, the first question is, whether, the statements in that affidavit, considering them as charges and statements in the bill, amount to an allegation of an enforceable agreement; my opinion is that they do. The landlord of a coal set, having four tenants, partners, holding under a lease of which there are several years to come, and which reserves a rent that circumstances shew to be beyond the value, (in fact a very heavy rent), enters into an agreement with the four lessees, of whom two are his sons, that from the partnership one of his sons and one of the two others shall retire, so that the benefit of the lease and business of the colliery shall remain to the other two, and that, this being done, the landlord will not only consider the subject of rent, but will refer the subject to a competent person, and, on the report of that competent person being made, will, if the report shall seem right, adopt it, and grant a new lease. That is a valid and binding agreement, an agreement for valuable consideration, and involves, as part of its terms, not merely a surrender and new lease, but a relinquishment of the interest of two partners; one of them being the landlord's son.

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The dissolution so agreed upon takes place; the release so agreed upon takes place, by which two of the lessees, the plaintiffs, take upon themselves alone the liability which before was shared by the four. It has been urged by Mr. *Bigg* that, under the circumstances of the case, this was no part-performance of the agreement, and, in support of his argument, he has cited *O'Reilly v. Thompson* and *Frame v. Dawson*—both good cases. In *Frame v. Dawson* the act done was not distinctly referable to any agreement. It might and would have been done without any agreement: it was a matter of duty independently of any agreement. In *O'Reilly v. Thompson* the agreement was between two, and not between the three. Here, the agreement is between the five—between the four and the one, and not the two and the one; and it is part of the entire agreement that the dissolution and release shall take place. They do take place. It is impossible to treat these acts otherwise than as acts of part-performance, taking the case out of the Statute of Frauds.

The next question is, whether Hugh Parker's affidavit is to be believed. [His Honor here remarked upon the credibility of Hugh Parker's affidavit, which he said, notwithstanding some degree of looseness, and notwithstanding that the parol agreement mentioned in it was not referred to in the written documents, he entirely believed. He then proceeded thus:] What would have been the result, if, before the bankruptcy, Mr. Parker had refused or neglected to appoint a person to survey, or, having appointed him, had refused to accede to his report, whether altered or unaltered, I need not say. Greater difficulties, possibly insurmountable ones, would have been in the way of the plaintiffs. But that state of things does not exist. For valuable consideration the agreed reference is made, and the result of the reference is acceded to. I am of opinion that in this case the Statute of Frauds being

out of the question, there was a complete contract ; that a valid parol agreement was in part performed within the meaning of that expression as used in courts of equity, and that every step was taken on each side which rendered it compulsory upon Hugh Parker to perform it before the bankruptcy.

It is said, however, that there is uncertainty in the agreement. In my view of the case, that question, perhaps, does not arise. The parties have construed the agreement in a manner the most favourable to the landlord ; and I think that I shall, in this case, do justice if I hold them to that construction. The draft, in its present state, was approved by Hugh Parker or his solicitor, before the bankruptcy. I think it was completely binding as to the inception of the new term, and the inception of the varied rent.

UPON the exceptions and further directions—declare, that the exceptions be neither allowed nor over-ruled. Let the deposit be returned. Declare the plaintiffs entitled to have the agreement entered into between them and Hugh Parker the elder, and the defendants John Parker and James Rhodes specifically performed. And let the defendants, the assignees, accept a surrender of the existing lease, and execute the lease that has been prepared and engrossed.

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COCKRILL v. PITCHFORTH.

Testatrix gave the residue of her personal estate to twelve persons, or such of them as should be living at her decease. She then directed her real estate to be sold at a certain time, and gave the produce to the same twelve persons, and three others, or such of them as should be then living. She then added a proviso, that the "share or proportion" of S., one of the twelve legatees, should be settled to her separate use for life:—*Held*, upon the construction of the whole will, that the proviso applied as well to S.'s share in the residue of the personalty as to her share in the produce of the realty.

ELIZABETH GROCOCK, by her will, dated the 15th November, 1824, after bequeathing certain pecuniary legacies, gave and bequeathed the residue of her personal estate to Charles Pitchforth and Frederick Kercheval and the survivor of them, and the executors &c. of such survivor upon trust, with all convenient speed to sell and dispose of so much thereof as should not consist of ready money or money in the funds, and then upon further trust to pay, apply, and divide the same unto and amongst the several persons following, that is to say, Truman Machin, Hector Tause, John Machin, Sabra wife of Thomas Cockrill, Sarah wife of John Cockrill, Elizabeth wife of David Bidmead, Maria wife of Frederick Kercheval, Jane Elizabeth Hankinson, Elizabeth Mary Wardell, Caroline wife of Charles Pitchforth, Charlotte St. George, and Elizabeth Eleanor St. George, or such of them as might be living at the time of her, the testatrix's, decease, in equal shares and proportions. And as to her freehold messuages and estates, the testatrix gave and devised the same to the said Charles Pitchforth and Frederick Kercheval, their heirs and assigns, upon trust, out of the rents and profits of the said premises, or otherwise, to pay three several annuities of £40, £30, and £10, to Edward Machin, Eleanor Anson, and Elizabeth Hankinson, during their respective lives; and after payment of the several annuities, upon further trust to lay out and invest the surplus rents in government securities, and from time to time to lay out and invest the accruing dividends, and interest to be received from such investments, as an accumulating fund during the lives of the several annuitants, and the life of the survivor of them; and after the decease of the survivor of them, upon trust to sell and dispose of all her, the said testatrix's, freehold messuages and

hereditaments by public auction or private contract, for the best price that could be obtained for the same respectively, and to pay, apply, and divide the clear produce of such sale unto and amongst the following persons or such of them as should be then living, that is to say [then followed the names of the legatees above-mentioned, and three others] in equal shares and proportions:—Provided always, that as to the share or proportion of the said Sabra, the wife of Thomas Cockrill, it was her, the testatrix's, will and mind, that such share or proportion should be invested in the funds in the names of her said trustees, upon trust to pay the interest and dividends thereof into the hands of the said Sabra Cockrill, during her life, for her own absolute use and benefit, and not to be subject to the control of her then present or any future husband; and after her decease, then upon further trust, to pay, assign, and transfer the funds in which such share should have been invested, and all dividends and interest accruing thereon, unto Richard Cockrill, the son of the said Sabra, for his own use and benefit. And the testatrix willed and directed that the purchaser or respective purchasers of her said estate, or any part thereof, should not be liable or obliged to see to the application of the purchase-mones or any part thereof, or be liable for the misapplication or nonapplication thereof, but that the receipt or receipts of her said trustees or the survivor or survivors of them should be a good and sufficient discharge for the same. Then followed a general clause for the indemnity of the trustees; and a power to them to lease the premises for a term not exceeding twenty-one years in possession. And the testatrix appointed the said Charles Pitchforth and Frederick Kercheval to be executors of her will.

The testatrix died in March, 1826, and the will was proved the following month.

The trustees paid the legatees, and set apart £148 out of

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the personal estate to answer the share of that fund given of Sabra, the wife of Thomas Cockrill. Mrs. Cockrill having died, her husband, in July, 1844, filed the present bill against the trustees and against one Tomlinson the assignee of Richard Cockrill's interest, claiming the transfer of the fund to himself; alleging that the clause in the will directing the share or proportion of his wife to be for her separate use &c., was applicable to the real estate only.

One only of the annuitants mentioned in the will was dead.

Mr. *Tripp*, for the plaintiff.

Mr. *Shebbeare*, for the trustees.

Mr. *Russell*, and Mr. *Bagshawe*, for the defendant Tomlinson.

The VICE-CHANCELLOR.—The words that the testatrix uses are—"the share or proportion"—not "the said share"—not "the last-mentioned share." Although, in effect, there were two distinct properties to be divisible at different times, in respect of which Mrs. Cockrill's share or proportion was different in extent; yet, the words are, according to correct grammatical construction, large enough to include her interest in both. If, according to the natural sense and ordinary interpretation of the words, they are applicable to both, what is the more probable construction? In regard to the personal property, the share given is immediate: as to the other property, there is a further contingency, namely, that of the legatee surviving other persons who have survived the testatrix. It is improbable that the testatrix meant to exclude the husband and include the son of the legatee as to the more remote and

contingent fund, without entertaining the same intention as to the nearer and more certain fund.

I was at first struck by the use of the expression "my said trustees;" but in looking at the bequest of the personal estate, I see that, however unnecessarily, the testatrix gave the personal estate to her executors upon an express trust to sell and convert it. There is nothing, therefore, in the word "trustees" which has the effect of limiting the meaning of the clause in question.

Again, I was struck with the position in which this clause stands. For, preceding, as it does, the clause providing that the trustees' receipts shall be sufficient discharges to the purchasers, and following a clause relating to real estate only, it might seem, upon a first perusal, to apply to real estate only. But it must be recollected that, however unnecessary a receipt clause may be as to sums received by executors in respect of the personal estate, yet, here, considering the previous trust as to the personalty, it was by no means unnatural for the testatrix to insert a clause so framed as to extend to such sums; and she has accordingly done so.

Upon the whole, I think that the grammatical and strictly correct construction of this will ought to prevail. The plaintiff's costs, however, must be paid out of the estate, as the testatrix has caused the difficulty by her own language.

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Will of realty, dated prior to the 1st January, 1838, and bearing upon the face of it certain obliterations which were favourable to the claim of the heir at law of the testatrix, established against the heir, without the obliterations: the evidence leading to the conclusion that the obliterations were not made previously to the execution of the will, or under circumstances rendering them valid within the provisions of the 6th section of the Statute of Frauds; and the heir not desiring an issue.

WYNN *v.* HEVENINGHAM.

ANN HEVENINGHAM, spinster, by her will, dated the 23rd April, 1824, after directing payment of her debts and bequeathing several pecuniary legacies, gave, devised, and bequeathed to Henry Smith, Robert Howse, Jeremiah Wynn, and Joseph Wynn and their heirs, all her real estate, and all her personal estate and effects, whatsoever and wheresoever, upon trust that they or the survivor of them, &c. should, as soon as conveniently might be after her decease, sell the real estate and such parts of her personal estate as were saleable in their nature, and collect such parts of the personalty as were not saleable, and should stand possessed of the monies so arising from her real and personal estate upon the following trusts; viz. as to one tenth in trust for Edward Heveningham and his wife for their lives, and then for their children in equal shares, the shares of the children to be payable at twenty one; one other tenth in trust for Henrietta Maria James and her husband for their lives, and then for their children in equal shares, such shares to be payable at twenty one; another tenth in trust to pay, transfer, and assign the same to George Heveningham, his executors, administrators, and assigns, to and for his and their own absolute use, benefit, and disposal, and as his and their own proper monies; another tenth in trust for Mary Anne Lovatt and her husband for their lives, and then for their children in equal shares, such shares to be payable at twenty one; another tenth in trust for Sarah Heveningham for her life, and then for her children in equal shares, such shares to be payable at twenty one; another tenth in trust for Henry Heveningham absolutely, in the same terms in which the gift was made to George Heveningham; another tenth for John Heveningham absolutely, in the same manner; another tenth in trust for Eliza

Heveningham for life, and then for her children in equal shares, such shares to be payable at twenty one; another tenth for Jane Heveningham and her children in like manner; and the remaining tenth for Lucy Heveningham and her children in like manner. The will then proceeded thus:—"Provided always and I hereby direct that my said trustees and the survivors and survivor of them and the executors and administrators of such survivor, shall pay and apply the interest, dividends, and yearly produce of the shares of the respective children of the said Edward Heveningham, Henrietta Maria James, Mary Anne Lovatt, Sarah Heveningham, Eliza Heveningham, Jane Heveningham, and Lucy Heveningham, of and in the said trust monies respectively, for or towards the maintenance, education, or benefit of such children respectively until their respective share shall become payable, and in case of the death of any or either of them the said Edward Heveningham, Henrietta Maria James, *George Heveningham*, Mary Ann Lovatt, Sarah Heveningham, *Henry Heveningham*, *John Heveningham*, Eliza Heveningham, Jane Heveningham, and Lucy Heveningham, without leaving issue who should attain twenty one years; then I will and direct that my said trustees for the time being shall stand possessed of and interested in such deceased person's share of the said trust money, upon such trust in favour and for the equal benefit of the survivors of them the said Edward Heveningham, Henrietta Maria James, *George Heveningham*, Mary Anne Lovatt, Sarah Heveningham, *Henry Heveningham*, *John Heveningham*, Eliza Heveningham, Jane Heveningham, and Lucy Heveningham, and their children and issue, upon and for such and the same trusts, and to be payable and paid to them respectively in such and the same manner, and at such and the same times as is hereinbefore expressed as to their several and respective original shares or share." And the testatrix appointed the said

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Henry Smith, Robert Howse, and Jeremiah Wynn, executors of her will.

In 1833 the testatrix was found a lunatic, and in April 1842 she died. The several persons named in the will as donees of the residuary estate, were the brothers and sisters of the testatrix, of the half blood. Henrietta Maria James and her husband died in the lifetime of the testatrix, leaving five children. George and John Heveningham also died in her lifetime, without having been married; George having survived John. Edward Heveningham, who was the testatrix's heir at law, and Henry Heveningham, both married after the date of the will. Edward had no children, Henry had two children, who were born respectively in May, 1828, and February, 1834.

The sole next of kin of the testatrix living at her death were such of the before-named persons as were living at that time, and the five children of Mrs. James.

The bill was filed by the surviving trustees against the several persons interested in the residuary estate, praying that the will might be established, and the usual accounts taken.

At the hearing of the cause, it appeared that the will had been admitted to probate with the names which are printed in italics standing therein, although in the original will those names had been struck out, by means of certain lines drawn through them. It was alleged by the bill that this obliteration took place before the testatrix's death, though whether before or after the execution of the will the plaintiffs could not state. Under these circumstances, the court with a view to the protection of the heir at law in reference to a possible unconverted portion of the residue (*a*), directed an interrogatory to be exhibited for the

(*a*) *Cruse v. Barley*, 3 P. W. Beav. 576; *Ex parte Pring*, 4 Y. 20; *Ackroyd v. Smithson*, 1 Bro. & C. 507. C. C. 503; *Salt v. Chattaway*, 3

purpose of ascertaining the circumstances under which the names were struck out.

The cause now came on for hearing for further directions.

Upon examination of the will it appeared that, besides the erasures in question, there were several others of which the more important ones were noticed in the attestation. These erasures, however, were effected by means of a number of small oblique lines which appeared to have been drawn with the same ink with which the will was written; whereas the erasures in question were effected by means of horizontal lines, and in ink of a different colour.

It was agreed that the affidavit annexed to the probate copy, as granted by the Ecclesiastical Court, should be received as evidence. It appeared from this affidavit that the will had been delivered to Mr. Smith the solicitor of the testatrix, immediately after its execution, and had been kept by him for many years in a bureau in his bed-room, to which his wife had access. He died in October, 1842. Some short time previous to his death the will was placed in the custody of Mr. Robinson the plaintiff's solicitor.

Upon the interrogatory exhibited under the decree in this Court, John Windo Harris, one of the attesting witnesses to the will, (the others being dead), was examined. The witness, after stating that the names "George Heveningham," "Henry Heveningham," and "John Heveningham" were partially obliterated in two places in the will, deposed as follows:—"Such names were so struck out or partially obliterated at some time after the date of the execution, but by whom or for what purpose I cannot say; but I was present at the execution, and, from being clerk in the office of the solicitor who prepared the will, I know that they were not obliterated before. But, whether the said names were so struck out or partially obliterated in the said two places, or at all, before the death of the said Ann Heveningham, I cannot say. The said Ann Hevening-

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ham did not sign, seal, publish, and declare the said produced paper writing, as and for her last will and testament, after the said words or names were struck out, or partially obliterated." * * *

Upon his cross-examination he deposed as follows :— "I attested the execution of the said produced paper writing by the said Ann Heveningham, on or about the 24th of April, 1824. The said produced paper writing was prepared by Mr. Henry Smith, who was the solicitor of the said testatrix. After my attesting it, Mr. Smith took it into his possession. He did so by the direction of the said testatrix, but I cannot say whether he kept it in his possession until his death ; he died in October, 1842. I continued to be his clerk till 1833. I never saw the said exhibit after I had attested it till after the death of the said testatrix. I first read it over, after my attestation, in Mr. Robinson's office, in November, 1842. I did so, for the purpose of examining what erasures or alterations had been made in it. I did so by the authority of the said Mr. Robinson, solicitor for the plaintiff in this cause. The erasures or alterations that were made in the said produced paper writing, before the said testatrix executed the same, were made by myself. I know those that I made, from their being made in a particular manner, and also from having, as clerk to Mr. Smith, written it all out myself, and from its being executed very shortly after I had written it. It was as I wrote it, and as I altered it when I attested its execution. My memory is good enough for that, notwithstanding the time which has elapsed. My memory in this respect is confirmed by knowing well and recollecting at the time what was the intention of the testatrix towards the persons whose names are struck out. * * * Remembering that I am on my oath, I can say that the names now appearing to be erased were not erased when the testatrix executed the same paper writing."

Mr. *Craig* for the plaintiffs.

Mr. *Russell* and Mr. *Chandless*, for the defendant, the heir at law.—The obliterations are valid. The names were originally introduced by mistake. It was reasonable that the correction should be made, and, under the circumstances of the case, the testatrix having become of unsound mind in 1833, it may be presumed that the alteration took place before the 1st of January, 1838. In *Pechell v. Jenkinson* (a), a codicil without date and unattested was made to a will dated in June, 1830, and the Ecclesiastical Court pronounced in favour of the codicil; there being nothing to shew that it was signed after the 1st January, 1838, when the stat. 1 *Vict.* c. 26, came into operation. In the present case the will was in Smith's custody before the 1st January, 1838, and the question is, whether he made alteration, and, if so, whether he did it under the testatrix's authority. He was her solicitor, relative, and confidential friend. It is not to be presumed that he made the alteration of his own accord and without her knowledge: he had no interest in so doing.

Mr. *Wigram* and Mr. *Toller*, for the defendants, the Lovatts—The *onus* is on the heir at law to shew that there has been a revocation of the will. The erasures, to be effectual, under the Statute of Frauds, must have been done by the testatrix, or by her direction, and in her presence. It is clear from the evidence of Harris, that the erasures in question were not made at the time of the execution of the will. After execution it was delivered to Smith, who kept it till 1841. It is probable that Smith made the alteration, intending afterwards to call the testatrix's attention to it and to obtain her sanction. If so, the obliteration is ineffect-

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(a) 2 Curt. 273.

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ual: *Doe d. Perkes v. Perkes (a)*, *Martins v. Gardiner (b)*, *Colvin v. Fraser (c)*. The presumption which arose in *Pechell v. Jenkinson*, in regard to personalty, cannot arise in regard to realty, until the provisions of the 6th section of the Statute of Frauds have been satisfied.

Mr. *Teed* and Mr. *Torriano*, for other defendants in the same interest.

Mr. *Swanston* and Mr. *Chapman*, for other defendants in the same interest.—At the date of the will, the three legatees whose names are struck out were young unmarried men. Their names might on that account be omitted in the first part of the proviso, relative to maintenance. The same reason did not exist as to the remaining part of the proviso. It was clearly the intention of the testatrix, that in case *any* of the legatees should die without leaving issue to attain twenty-one, the share of that legatee should go over to the others or their issue attaining twenty-one. The effect of the plaintiff's construction is to create an intestacy. It is submitted that the will as unaltered is more correct in its frame, and more consistent, on the face of it, with the probable intention of the testatrix, than it will be if the obliterations are held valid. In addition to this, the testimony of Mr. Harris is unimpeached.

Mr. *Russell*, in reply.

All parties declined taking an issue.

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The VICE-CHANCELLOR:—I have considered the questions of fact which the counsel for all parties in this case expressed a wish that I should not send to a jury, but

(a) 3 B. & Ald. 489.


(b) 8 Sim. 73.

(c) 2 Hagg. Ecc. R. 266.

should decide myself. They relate to certain ink lines, which, in the seventeenth page of the will of the testatrix, are, by way of obliteration, or attempted obliteration, drawn across the names "George Heveningham," "Henry Heveningham," and "John Heveningham;" the dispute, which I understand to concern freehold estate only, being, whether these ink lines were made before the testatrix's execution of the will, or were, if made afterwards, made (to use the language of the Statute of Frauds) "by the testatrix herself, or in her presence, and by her directions and consent." Supposing the ink lines to be in either of these predicaments, the heir-at-law is considered to be entitled to participate in the produce of her freehold estate in a manner in which otherwise he is not, and it is considered for his interest to maintain the affirmative in the dispute, as I have stated it.

His view of the case has not been taken by the Ecclesiastical Court: where probate of the will has been granted, (the heir being one of the next of kin) without the ink lines and with the names; treating them as not erased—as not obliterated. The matter may not have been discussed adversely in that Court; which, however, had before it an affidavit, made by several deponents addressed, or in part addressed to the point: and I think, that the conclusion there, being as it is, would have been the same, if, in addition to that affidavit, the Prerogative Court had had before it the rest of the materials, with which I have to deal on the present occasion. The argument, therefore, of the heir-at-law, though addressed to this Court with respect only to real estate, appears clearly to be substantially opposed to the judgment of the Prerogative Court—an observation which may or may not be of weight, but, of course, is very far from conclusive; nor, if unable to assent to that judgment, ought I to conceal the opinion.

All parties are, as I understand, agreed that the will

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was executed by the testatrix in the year 1824, in which it bears date. She does not appear to have re-executed it, or to have made any codicil, and the statute of 1837 is admitted on each side not to affect the case.

Of the attesting witnesses to the will, one only has been examined, the only one indeed alive. The other two died, as I collect, before the testatrix. Mr. Smith, the solicitor, in whose office the will was prepared, who appears to have been present at its execution, and is appointed by it one of the trustees and executors, is dead also; as is his wife, to whom the testatrix was, as I collect, related. Neither of them has been or, as I collect, could have been examined.

The body of the will was written by Mr. Harris, the attesting witness now living, whom I have mentioned, then Mr. Smith's clerk. There is not any positive or direct proof, or rather, probably, I ought to say, there is not any proof, when or where, or in whose presence, or by whom the ink lines were, or any one of them was made; but it is reasonable to suppose, that they were all made together on a single occasion. Mr. Harris ought, I think, to be considered as swearing positively and deliberately to the fact that neither of them was made before the execution, or before the attestation, of the will.

The exact place and mode of custody of the instrument, from the time of the completion of its formal execution and attestation to the testatrix's death, do not fully appear on the evidence. I collect, however, that it was taken by Mr. Smith, with her assent, into his keeping, immediately after its execution and attestation; and the probability, at least, is, that it remained from thenceforth in his house until some time after the testatrix had fallen into a state of mental incapacity. It is agreed on each side that she fell into that state in 1833 or 1834, and never recovered, and that she died in the year 1842; before which event

Mr. Smith appears finally to have parted with the custody of the will; and there seems substantial reason to believe that the ink lines were on it, when he so finally parted with it, as they now stand.

Having made these preliminary statements, I think it convenient next to express my opinion, whether, assuming the ink lines not to have been made before the execution of the will, there is evidence shewing, or ground for presuming, that they were made by the testatrix herself or in her presence. As I have already intimated, I am not aware that there is any such evidence; and my opinion is, that the nature of the custody of the instrument, as far as I collect it, and the admitted facts of the case, preclude any such presumption. That she visited Mr. and Mrs. Smith at their house frequently or occasionally, while the will was there, I doubt not; and that it is very possible that she may have seen the will when there, or spoken of it while it was there, or both, I agree: but there is no proof that she did so, and I cannot assume it. I consider therefore, the correct judicial conclusion to be, that the ink lines, if they were made after the testatrix's execution of the will, were so made, not by herself, nor in her presence; nor is there proof, nor can I infer, that, if made after the execution of the will, they were made by her direction.

The next remark, whatever may be its weight, is of a nature sufficiently obvious; namely, that the admitted circumstances, the absence of any proved misconduct, and of any suspicious conduct on the part of any person in particular, and the absence of any slur upon the reputation of any one person concerned, render the alleged fact, that the lines were made after her execution of the will neither by herself nor in her presence, one of an improbable kind—I do not say impossible—I do not say extremely or violently improbable—but improbable. That which is improbable may of course have taken place; nor can it be considered

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an absurd or irrational contention to assert that this did take place: it is matter of reasonable inquiry.

By what I have said the inquiry, of course, is now reduced to the question, whether upon the evidence before the Court, it ought or ought not to be taken that the ink lines were made before the will was executed. The observation is probably just, that the proviso or clause where they occur is with them, rather than without them, in the form and of the nature that a lawyer would expect in a will, worded in other respects as the will in question is; by which I mean, that I think it likely, that had the ink lines never been made, a lawyer reading the will would have guessed that the three names in question had been written among the other names in the clause or proviso through inadvertence merely; though it is right also to mention, that the will, with or without the three names in the places in question, with or without the ink lines, must probably be with reason thought not to exhibit throughout marks of extreme care, or consummate skill, or great accuracy, in its preparation; and, in particular, that the word "issue," twice occurring—the word "leaving," and the word "survivors," in the proviso or clause under consideration, render it, whether read with or without the ink lines, not such as a lawyer (to repeat a phrase just used) would have expected to find in a will, worded in other respects as this will is. A conveyancer, or any lawyer, must, I think, see (I do not say invalidity, uncertainty, or absurdity, but) a want of adaptation,—a want of fitness in the clause, with or without the ink lines; and though a disposition to adhere to Mr. Harris, as a witness, could not, I think, be created or increased by what he says of the intention of the testatrix; yet it would, I think, be wrong to treat him as being, on that ground, a witness unworthy of credit. It would be too strong to say, that it is absurd to suppose it possible for the testatrix to have intended the clause to stand with the three disputed names

in it. The minute or memorandum of attestation, written as it appears to be, and noticing alterations particularly and generally, is consistent with either theory: a remark, subject, however, to this observation, that the obliterations in question, if intended as obliterations, are of such materiality as to render it probable rather than improbable, that, if they had been made before the execution of the will, they would, as some alterations are specified by the minute or memorandum of attestation, have been also specified in it.

Is there, then, a presumption in favour of these obliterations having preceded the execution, sufficiently strong to outweigh the evidence of Mr. Harris, if otherwise credible? I think not. The circumstances to which I have referred, and the mere comparison of the appearance of these obliterations with that of other alterations in the will, would, in the absence of any parol evidence, have rendered a supposition that the obliterations in question did not precede the testatrix's execution not violently improbable; though I agree that probably, had Mr. Harris not been examinable, the obliterations must have stood as part of the will. Is he, then, a trustworthy and credible witness upon the point under consideration? His reputation and respectability are not impeached, they are not questioned. He must be treated as a witness of unblemished character, unless so far, if at all, as by his testimony now before the Court he is blemished. He is not contradicted in any respect. His evidence includes no impossibility, and but one improbability, not comprised in the observations that I have already made, namely, the clear and accurate recollection of the state of the instrument at the time of its execution, which after the lapse of so many years he states himself to have. Considering, however, that he was then between twenty-five and thirty-five years of age, and that he was Mr. Smith's clerk, and wrote the body of the will in

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that capacity, and was an attesting witness who signed his name on every sheet,—considering also that I must assume him to be a respectable man, of good reputation,—I think that it would be unsafe judicially to discredit him.

It has been stated at the bar, though not proved, that the draft of the will exists, exhibiting on the face of it ink lines across the names in question, corresponding with the ink lines in the will itself, which are in dispute. Supposing this to be so, it does not, without more, seem to me to afford a weighty, if any, argument against the evidence of Mr. Harris, nor has the statement increased or diminished the strong wish that I have, from the beginning, felt and expressed, that this point should be tried in an issue, and not decided by me without that assistance, or the belief that I have, throughout the discussion and consideration of the case, entertained, and more than once mentioned, both that an oral examination of Mr. Harris would be useful, and that, besides, there is evidence procurable, which now I have not. The parties, however, with the knowledge of all this, with the knowledge that either of them might have had an issue by asking for it, having persevered in desiring me to decide the point without it, I have determined rather to consult their wishes than my own under such circumstances, especially as the value of the funds in dispute is not large. Finding it, therefore, in a sense incumbent on me to come to a decision upon the materials at present before the Court, I declare my opinion, after an attentive consideration of the case, to be, that the proper judicial conclusion from these materials, as to the real estate, is one consentaneous to that of the Prerogative Court as to the personal estate.

ALL parties by their counsel desiring that the question raised by the pleadings in these causes whether the names “George Heveningham,” “Henry Heveningham,” and “John Heveningham,” appearing

upon the face of the original will to be struck through with a pen and ink, are, as to the real estate of the testatrix, to be read as remaining in the said will—declare, that the names “George Heveningham,” “Henry Heveningham,” and “John Heveningham,” appearing in two places in the said original will to be respectively struck through with a pen and ink, ought, as to the real estate of the said testatrix, to be read as if the same still remained entirely unobliterated, and as part of the clause of the said will in which they are respectively contained. Declare, that upon the death of John Heveningham, in the lifetime of the testatrix, without leaving issue, his one-tenth share survived to the other persons entitled under the said will to the residue of the said testatrix’s estate, and that, upon the death of George Heveningham, his original share survived in like manner, and his accrued share lapsed. Declare, that, according to the true construction of the proviso in the said will contained as to the death of any of the persons therein mentioned, without leaving issue who shall attain the age of twenty-one years, the gift over, in such proviso contained, is not confined to the shares of such of the same persons as should die in the lifetime of the said testatrix, and that the one-tenth share, by the said will expressed to be given to the said plaintiff, Henry Heveningham, in the trust monies in the said will mentioned, is not absolutely and unconditionally vested in him, but will be liable to the operation of the said gift over if he shall die without leaving issue living at the time of his death who shall have attained or shall attain the age of twenty-one years, but that he is absolutely and unconditionally entitled to the eighth part of the two tenth parts of the said trust monies, which, by the deaths of the said George Heveningham and John Heveningham, have become liable to the operation of the said gift over.

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Testator, after giving a general direction for payment of his debts, gave and bequeathed all his real and personal estate to his wife for life, and, after her decease, he directed all his real and personal estate to be sold, and the produce to be divided between the children of certain persons named in the will. And he directed that the purchaser or purchasers of any part of his real or personal estate should not be liable to see to the application of the purchase-money, and that the receipt or receipts of his executor, his heirs, executors, and administrators, should be a sufficient discharge or sufficient discharges to the purchasers: and he appointed his wife and A. B., his executrix and executor:—

Held, 1st, that the executrix and executor, or one of them, had an implied power (in case the testator died indebted) to sell the real estate for payment of the debts; 2ndly, that the executrix and executor having entered into a contract for the sale of parts of the estate, and it being shewn that at the time of the contract there were unsatisfied debts of the testator, the contract was valid; 3rdly, that the purchaser was not bound to take the title without the concurrence of the heir-at-law.

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JAMES LLOYD, by his will, dated 4th November, 1843, directed all his just debts, funeral and testamentary charges and expenses, to be paid out of his estate and effects; and subject thereto, and also to the payment of £5 to his executor, thereafter named, for his trouble in taking upon him such office, he gave and bequeathed all his freehold, copyhold, leasehold, personal, and other his real and personal estate whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, unto his dear wife Susannah, during the term of her natural life, for her sole and separate use, and free from the debts and control of any future husband she might intermarry with; and from and after her decease, he directed all his real and personal estate and effects to be sold, either by private sale or public auction, for the best price that could be got for the same; and after payment of the expenses of such sale and incident thereto, he directed the produce thereof to be divided and paid in the following manner (that is to say), one equal part thereof to the children of his sister Mary Neale, widow of Thomas Neale, if more than one, in equal shares and proportions, and if but one child, then to such only child; and as to one other part, &c. [The testator gave the three remaining fourth parts of the produce in the same form to the children of three other different persons named in the will.] And the testator directed that the purchaser or purchasers of the whole or any part of his real or personal estate should not be liable to see to the application of the pur-

chase-money; and that the receipt and receipts of his executor, his heirs, executors, administrators, and assigns, or other person or persons acting in the administration of that his will, should be a sufficient discharge or sufficient discharges to the purchasers of the whole or any part of the real or personal estate directed to be sold under that his will. And he directed that his said executrix and executor, and their respective heirs, executors, administrators, and assigns, should retain to and reimburse herself, himself, and themselves, all loss, costs, charges, damages, and expenses which she, he, or they, or any of them, might sustain, pay, suffer, or be put unto in the execution of his will; and that neither of them should be answerable or accountable the one for the other, nor for involuntary losses. And he appointed his wife Susannah executrix, and W. Gosling executor of his will.

The testator died shortly after the date of his will, which in December, 1843, was duly proved by the executrix and executor.

Upon the allegation that the testator was considerably indebted at his death, and that his personal estate was not sufficient for the payment of his debts, his executor and executrix caused his real estate to be put up for sale, in lots, by public auction, on the 6th of May, 1844. By the fifth condition of sale, the purchaser, in case he should require the testator's heir-at-law to be a party to the conveyance, was to be at the expense of tracing his pedigree and obtaining his concurrence in the sale; and by the eleventh condition, it was provided, that the executrix, Susannah Lloyd, should, if required, disclaim any life-estate she might be supposed to have in the premises, or any part thereof.

At the sale, John Carter, the defendant, was declared the purchaser of a piece of freehold land, forming lot 2, at the sum of £155, and he entered into and signed an agreement for the purchase, and paid his deposit. An abstract

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of the title of the vendors to the premises was afterwards delivered to him.

The bill which was filed by the vendors to enforce specific performance of the agreement, charged that in the course of the correspondence which took place between the solicitors of the respective parties, the plaintiffs' solicitor distinctly apprised the defendant's solicitor that the testator's personal estate was insufficient for the payment of his debts, and that the sale had been made by the executors for the purpose of raising a fund for the discharge of such debts; and that the plaintiffs had also informed the defendant that the testator's widow was willing to disclaim her life-interest, and to release her dower, by which means, as the plaintiffs insisted, the power of sale contained in the will would be accelerated.

The defendant by his answer insisted, that, the property in question not having been devised by the testator to the plaintiffs in trust for sale, and for the payment of his debts, but having been merely charged with the payment of them, the legal estate was vested in the plaintiff Susannah Lloyd, the testator's widow, for her life, and the reversion in fee expectant on her decease belonged to the testator's heir-at-law; and that the plaintiffs, as executors, were unable, without the heir-at-law joining, to make a good and complete conveyance to a purchaser, and, in fact, had not any power to sell. Moreover, that the only period appointed by the testator in his will for the sale of all or any part of his hereditaments was after the death of his widow, and that the different persons intended by the testator to take the benefit of the reversionary fund, and among whom the produce of the sale of his real and personal estate was to be divided, were not capable of being ascertained until the period of such distribution should have arrived. And although the defendant admitted that the plaintiffs had given him such information as to the object of the suit as

charged in the bill, yet he stated, that, during the whole of the correspondence between the respective solicitors, the necessity of selling the whole of the real estate of the testator, or, in particular, the hereditaments comprised in lot 2, had never been shewn.

The cause now came on for hearing.

Mr. *Wigram* and Mr. *Hardy*, for the plaintiffs, relied on *Shaw v. Borrer* (a), *Ball v. Harris* (b), and *Forbes v. Peacock* (c), as shewing, that, under the charge of debts the plaintiffs had an implied power to sell and to give receipts for the purchase-money. They also contended, that the heir-at-law was not a necessary party to the conveyance; but that, if he was, that was a mere question of conveyance, and that the fifth condition of sale, which had been adopted by reason of the difficulty of finding the heir, imposed the expense of solving that question on the purchaser.

Mr. *Teed* and Mr. *Goldsmith*, for the defendant.—The question is, whether a general charge upon the testator's estate gives an implied power to the executors to sell for payment of his debts. In *Shaw v. Borrer*, and *Ball v. Harris*, a legal estate in fee was vested in the devisees in trust, or one of them; and the sale was made by or with the consent of the devisees. Here, there is no party who can give his assent to the sale of the fee. If in cases of this nature the executors alone have power to sell, the consequences may sometimes be that a valuable estate may be put up for sale in payment of a very few debts. The question certainly is, who can give a legal discharge; but it does not follow that executors are necessarily the proper parties to do so. In *Patton v. Randall* (d), a di-

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(a) 1 Keen, 559.

(c) 11 Sim. 152.

(b) 8 Sim. 485; 4 Myl. & Cr.

(d) 1 J. & W. 189.

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rection by will for the sale of an estate in a given event, without any direction by whom it was to be sold, was held not to give a power of sale to the executors by implication. In *Forbes v. Peacock* (a), it was said, by *Rolfe*, B., that the produce of the sale in that case was to be distributed in a way in which the executors alone could distribute it, and consequently that a power of sale in the executors was to be implied. In that case, also, it may be remarked, the time for sale had arrived. But no necessity for distribution by executors is shewn in the present case. It is not shewn that there are any debts. Suppose the testator had charged his estate, as he has in this case, and, subject to such charge, had given the fee to A. B., could the administrator have sold the property without the concurrence of the devisee? That brings it to the question whether the heir-at-law is not a necessary party to the conveyance. [The *Vice-Chancellor*. —That question seems at present premature.] It has been stated that there is a difficulty in finding the heir. If so, it is submitted that the question is one of title, and not of conveyance: *Wynne v. Griffith* (b).

In the course of the argument, the *Vice-Chancellor* referred to *Bailey v. Ekins* (c), and *Dolton v. Hewen* (d).

The VICE-CHANCELLOR, having asked the plaintiffs' counsel whether their clients would undertake to prove the existence of debts of the testator at the time of the contract, and having been answered in the affirmative, proceeded with his judgment as follows:—

In *Shaw v. Borrer* there was a charge of all the testator's debts. The fee of the advowson was devised to John Kenward Shaw and John Cornwall, upon trust, not for payment of the debts, but for purposes totally foreign to that object.

(a) 11 Mee. & W. 630, 639.
 (b) 1 Russ. 283.

(c) 7 Ves. 319.
 (d) 6 Madd. 9.

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One of the objects of that trust was Robert William Shaw, who was to be presented to the living of which the advowson was the subject of the contract for sale. The testator appointed John Kenward Shaw, Robert William Shaw, and John Kenward Shaw Brooke, his executors. John Cornwall was a trustee of the fee, but not an executor. John Kenward Shaw was both a trustee of the fee and an executor, and Robert William Shaw and John Kenward Shaw Brooke were not trustees of the fee, but executors. The will was proved by the executors, and the contract was entered into with the plaintiff by Mr. John Kenward Shaw and Mr. Cornwall, the trustees of the advowson, in concurrence with, or at the request of, the executors, as it was alleged. Now, Robert William Shaw was an executor. As a person beneficially interested, his concurrence would not alone have been sufficient; because the daughters were also interested in the question. It seems plain that the *Master of the Rolls* did not proceed upon the notion that the concurrence of the persons who were beneficially interested under the will was necessary. The *Master of the Rolls* goes through the cases. He then says: "It seems therefore clear" &c. (a). [His Honor here read the judgment of the *Master of the Rolls* to the end.]

Now, I do not here collect that the *Master of the Rolls* held that the existence of a legal devisee of the fee under the will was an essential ingredient in his decision. I think that a similar remark applies to the observations of Lord *Cottenham* in *Ball v. Harris*. In that case, the wife was not devisee of the land, as Harris was, and as Leatham had disclaimed, Harris became sole devisee. Harris was also executor. If the devisee was the person to sell, Harris would have been the only person to receive the money. If the executors were the persons to sell, then Harris and

(a) 1 Keen, 576.

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the widow were the persons to receive the money; and Harris and the widow did receive the money. If payment ought to be made to one, it is not, necessarily, a good payment to make that payment to one and another; and *Ball v. Harris* seems to me to involve the decision that it was the executors who were to sell, and not the devisee.

I repeat, therefore, that I cannot help thinking, that, in these cases, the existence of a legal estate under the will was not considered as essential to the decision. Whether it ought to have been so considered, is not a question before me. I think, however, in this case, that it is not necessary to give an opinion, and I do not give an opinion, whether the mere circumstance of charging the debts on the real estate, without more, gives to the executors a power of sale at law or in equity; because, looking at the whole will, I must say, that it appears from the will generally, that it was the intention of the testator that the estate should be sold for the payment of his debts. Without opposing the whole current of authorities, I cannot say that the general charge does not exhibit that intention. If that be right, the question is, by whom it is to be sold. Under this particular will it could only be sold by the executors or one of them, or by the heir-at-law; but I am of opinion, upon this will, that the intention to be collected is, that the heir-at-law should have nothing to do with it.

The testator gives and bequeathes, in a mass, all his real and personal estate to his wife for her life, and directs that, after her death, his real and personal estate shall be sold altogether. So that, if his intention was, that his real estate should remain unsold till that time, it was equally his intention that the personal estate should remain unsold to the same period—a provision which, as against creditors, would be unmeaning. He then declares that the purchasers of the whole or any part of the real and personal estate shall not be liable to the application of the purchase-

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money, and that the receipt or receipts of his executor shall be a sufficient discharge or discharges to the purchaser of the whole or any part of the real or personal estate directed to be sold. This is the will of a testator who has used expressions which the law construes as authorizing an immediate sale by some person; because he creates a charge in favour of persons who are not bound to wait for payment. When I consider that in this will the real and personal estates are confounded together—when I find the recognition of the right or power of the executor to give receipts—when I find the executor joined with the wife, and that they both sell—I think it impossible to say that this property has not been sold by the persons, or one of the persons, by whom the testator says that it should be sold.

It is not necessary now to say whether the sale can be completed without the joining of the testator's heir-at-law in the conveyance, or, in other words, without his concurrence. In my judgment, he is bound to give that concurrence, if necessary, upon the requisition of the executrix and executor and the purchaser. Whether the executor and executrix have power, without him, to confer the legal estate, I say not. What I should have done with this case, upon the assumption that there were no debts when the sale was made, I say not. I proceed upon the basis that there were debts at that time.

THE plaintiff undertaking to prove that there were debts of the testator owing and unsatisfied at the time of the contract in question—declare that the plaintiffs had full power to enter into the contract, and to make the sale that they contracted to make, without prejudice to any question whether the testator's heir-at-law will or will not be a necessary party to the conveyance.

The proof of debts having been given pursuant to the plaintiffs' undertaking, the cause now came on again for hearing.

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Mr. *Wigram* and Mr. *Hardy*, for the plaintiffs, referred to *Tylden v. Hyde* (a) and *Ward v. Devon* (b), as shewing that the joining of the heir-at-law in the conveyance was not necessary.

The VICE-CHANCELLOR.—In this will there is an express power of sale, and but one ; and that express power of sale is given so as not to arise till after the death of the testator's wife. The testator's wife is alive, and I decline deciding against the purchaser, (whatever may be my own opinion, if I have an opinion directly upon the point), that, whether the wife disclaims or does not disclaim, or has disclaimed or has not disclaimed, that express power of sale is now capable of being exercised or has been so. For the purpose, therefore, of this cause, it being a suit for specific performance, (however the point might be abstractedly decided), it must be taken that the express power of sale is not now exercised or exercisable.

But there is an implied power of sale ; because the life-interest of the wife is subject to the general charge for payment of debts. Therefore, in a sense, and in a manner, there does exist a power of selling during the lifetime of the wife, there being debts—which fact is proved. And I am of opinion that there is, upon this will, an intention exhibited that a sale, if made, should be made by the executors or one of them, and not otherwise.

The next question is, whether this intention is expressed so as to create a legal power ; in which case the concurrence of the heir-at-law would not be necessary. I am of opinion that this question is one of too great nicety and difficulty to decide against the purchaser. If he wishes

(a) 2 Sim. & St. 238.

(b) 11 Sim. 160, cited. It was said in argument in the principal case, that it was considered in the profession, that, had *Ward v. Devon*

been in print when Sir *John Leach* decided *Bentham v. Wiltshire*, 4 Madd. 44, he would have decided that case otherwise.

the concurrence of the heir, he must pay or not pay for the discovery of the heir according to his contract. Upon that I give no opinion. But I think that in this suit he is not to be compelled to take the title from the executor and executrix without the concurrence of the heir.

I decide, therefore, without prejudice to the question whether the heir is or is not a necessary party to the conveyance, that the executor and executrix, as debts are admitted to have existed at the time of sale, had power to sell.

It being admitted that the testator James Lloyd was, at the date of his will, and thenceforth to the time of his death, seised in fee simple of the estate which is the subject of the contract in the pleadings mentioned, and that, at the date of such contract, there were debts of the testator remaining unsatisfied—declare, that the plaintiffs, as executor and executrix of the testator, had in themselves good right and power to sell the estate by that contract. Declare, that, if the testator left an heir-at-law, the defendant ought not to be compelled to complete the purchase without a conveyance from such heir-at-law. Refer it to the Master to inquire whether a good title can be made to the premises, having regard to the preceding declarations. No costs to this time. Reserve subsequent costs and further directions, with liberty to apply.

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HOLCOMBE v. TROTTER.

Form of an
order to revive
by the survivor
of several co-
plaintiffs.

THIS suit having, by the death of two of the three co-plaintiffs, become abated, a motion, pursuant to notice duly served, was made on the 10th of February, 1845, on behalf of Hobhouse, one of the defendants, that Holcombe, the surviving plaintiff, might be ordered, within fourteen days after the service of the order to be made on such motion, to cause the suit to be revived, or, in default thereof, that the plaintiff's bill might be dismissed, as against the defendant Hobhouse, for want of prosecution, with costs to be paid by the plaintiff. On this application the plaintiff did not appear, and an order was made pursuant to the terms of the notice of motion.

A motion was now made on behalf of the plaintiff, pursuant to notice, that the order so obtained might be discharged for irregularity, with costs, to be paid by the defendant.

Mr. *Wigram* and Mr. *Cole*, in support of the motion, contended that the order should have been thus: "that the plaintiff do file a bill of revivor in this cause within fourteen days after the date of the order, or, in default thereof," &c.: *Chowick v. Dimes* (a), and the cases there cited.

Mr. *G. L. Russell*, *contra*, contended that the order was perfectly regular, and according to the established form: *Burnell v. Duke of Wellington* (b), *Chichester v. Hunter* (c). The most that the plaintiff could make of the authorities was, that he might, if he had appeared on the motion, have had the option of having the order drawn up in one of two forms.

(a) 3 Beav. 290.

(b) 6 Sim. 461.

(c) 3 Beav. 491.

The VICE-CHANCELLOR.—I cannot say that the order is plainly irregular, because orders have been, and still are, drawn in this form, though others are drawn in another form, which I think better. I shall grant the motion, but as the defendant gave notice of the form in which he intended that the order should be made, and as it was made according to the terms of the notice, I am of opinion that the plaintiff should pay the costs.

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WILDING v. RICHARDS.

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SAMUEL WILDING, being absolutely seised of certain freehold and copyhold estates, situate in the township of All Stretton, and possessed of a considerable personal estate, made his will, dated in May, 1832, whereby, after giving his personal estate to his mother, and exonerating the same from the payment of his debts, he devised all his real estate to trustees upon trust for sale and payment of his debts, and directed the surplus to be invested in real estates and conveyed to the use of his brother Henry Wilding for his life, with remainder to his issue in strict settlement, with remainder to the testator's right heirs. And the testator appointed the trustees to be his executors.

After the date of his will, the testator purchased certain freehold and copyhold estates in the township of All Stretton which were conveyed to him in fee simple; the copyhold estates being held of the manor of Stretton-en-le-Dale.

The testator, who survived his mother, died in July, 1832, intestate as to the after-purchased estates, leaving his brother Henry his heir-at-law, and heir according to the custom of the manor of Stretton-en-le-Dale; and Henry

The obligor of several bonds in which A., his solicitor, joined as surety, conveyed certain real property to A., upon trust to sell, and out of the proceeds of the sale to pay the bond creditors. The creditors did not execute, nor had any notice of the deed:—*Held*, that the deed was a mere deed of agency, and not binding in favour of the creditors, but that A. was entitled to retain the estates conveyed to him, until he should be discharged from his liability as surety under the bonds.

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entered into possession both of the devised and descended estates.

By an indenture, dated the 31st of January, 1833, made in contemplation of the marriage of Henry Wilding with the plaintiff Mary Wilding, (which marriage took place in August, 1833), reciting a bond of even date, under the hand and seal of Henry Wilding, whereby the sum of £5000 and interest was secured to be paid by him to John L. Richards and J. Rowlands within twelve months after the marriage, and reciting that Henry Wilding had agreed that such sum should be charged upon his freehold and copyhold estates, it was thereby covenanted and agreed by Henry Wilding that his freehold and copyhold estates in the township of All Stretton, and within the manor of Stretton-in-the-Dale, should stand charged with and be a security for that sum and interest. And in the same indenture, trusts were declared of the £5000 and interest for the benefit of the intended husband and wife, and the issue of the marriage.

Henry Wilding died in May, 1835, having by his will, dated in April, 1835, directed payment of his debts, and devised his real estates to trustees, whom he appointed his executors, upon trust to sell or mortgage the same for that purpose, and having bequeathed a legacy of £1000 to his widow, and devised the surplus of his real estate to his son Richard Wilding absolutely, with an ulterior limitation to his daughter Mary S. Wilding, in the event of his son dying under twenty-one, without leaving issue.

The bill was filed by Mary Wilding and Mary S. Wilding who (except Richard) was the only child of Henry Wilding, against the trustees of the settlement, the trustees and executors under the respective wills of Samuel and Henry Wilding, Richard Wilding, and several persons whom the bill alleged to have claims as incumbrancers upon the estates devised by Samuel Wilding, and upon those which descended from Samuel to Henry, praying that the trusts

of the settlement might be carried into execution, and that for that purpose the estates of the two testators might be duly administered.

By the decree made on the hearing of the cause, the Master was directed to inquire whether certain indentures of lease and release in the pleadings mentioned, bearing date the 13th and 14th October, 1832, and made between Henry Wilding of the one part, and John William Watson (a defendant to the suit) of the other part. were binding in favour of any, and what, parties, as between Henry Wilding, or his estate, and his creditors.

The circumstances attending the execution of these deeds appeared from the Master's report to be as follows:—

Samuel Wilding and Henry Wilding, with the defendant Watson, (who was their solicitor), as their surety, executed two joint and several bonds, dated respectively in the months of April and November, 1828, for securing the payment of two sums of £4000 and £500 and interest, and in the month of January, 1830, they executed another joint and several bond, for securing the sum of £600 and interest. After the death of Samuel Wilding, the relation of solicitor and client still subsisting between Henry Wilding and Watson, the deeds of lease and release in question were executed. By the release, Henry Wilding conveyed all the freehold estates and covenanted to surrender all the copyhold estates, which had descended to him from his brother, to Watson and his heirs, to hold the same, subject to certain mortgages affecting the same respectively, upon trust to sell and to pay off the sums due upon the mortgages, and, out of the surplus, to pay the several bond debts then due and owing from Samuel Wilding, deceased, or from Henry Wilding, with interest, and after satisfaction of the mortgages and bond debts, to pay the residue of the proceeds of the sale to Henry Wilding, his executors, administrators, or assigns, and in the meantime to stand seised

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and possessed of the premises in trust for H. Wilding, his heirs and assigns.

These deeds were not executed by any of the creditors, nor did it appear that any of the creditors had notice of them.

Shortly after the execution of them, namely, on the 25th of October, 1832, J. W. Watson was admitted as tenant to some of the copyhold estates. On the court rolls he was described as mortgagee of the premises. During the life of Samuel Wilding, and subsequently up to the death of Henry Wilding, in May, 1835, Watson received the rents of these estates; but, according to his own statement, he received them as solicitor and agent of H. Wilding. It did not appear that, under the powers given him by the deed, he had sold or mortgaged any of the premises, but he had made certain payments under it.

The Master having found that the indentures of the 13th and 14th of October, 1832, were not binding in favour of any parties as between Henry Wilding or his estate and his creditors, exceptions were taken to his report by the defendant Watson, which exceptions now came on for argument.

Mr. *Russell* and Mr. *Terrell*, for the exceptions.—First, whatever may be the effect of the deeds of October, 1832, in relation to the creditors, it is clear that Watson, to whom the property is conveyed, is not a mere volunteer. If Henry Wilding had attempted to call back the conveyance from him, Watson might have resisted that attempt, on the ground that Wilding had contracted by means of the deeds in question to release him from his liability, and that, until the bonds were discharged, the deeds must have effect, so far, at least, as he was concerned: *Small v. Marwood* (a), *Knight v. Fergusson* (b).

(a) 9 B. & C. 300.

(b) 5 M. & W. 389.

But secondly, this deed, whether to be postponed or not to the settlement, is a binding deed in favour of the creditors. The cases on this subject proceed on different grounds. In *Garrard v. Lord Lauderdale* (a), the *Vice-Chancellor of England* considered that a deed of trust, to which the creditors are not parties, is an arrangement solely for the benefit of the debtor, and that the creditors are not in the situation of *cestui que trusts*. On the other hand, in *Acton v. Woodgate* (b), Sir J. Leach treated such a deed as a power of distribution revocable by the debtor, and binding in favour of creditors until revoked. If that be a correct ground of decision, it follows, that, in this case, there was an ambulatory power during the lifetime of the testator Henry Wilding, which power has become irrevocable by his death.

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THE VICE-CHANCELLOR.—But for the authorities on this subject, I should possibly have felt myself bound to give effect to this deed; the trustee took upon himself to act under it, and it is not alleged that the deed in form was in any respect contrary to the intention of the parties.

But the state of the authorities (according to my apprehension) binds me to act in a manner which may possibly be against the opinion, that, in the absence of those authorities, I should have entertained; and I must treat the deed as not having effect, subject to this:—that all payments by the trustee or agent made in the proper execution of the trust or agency under it must be allowed to him; and, as Mr. Watson had himself an interest, when the deed was executed, in the payment of the bonds in which he was a surety, I wish to have the point argued, (if it is contested), whether the estate can be taken from him without paying those bonds.

(a) 3 Sim. 1.

(b) 2 M. & K. 492.

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Mr. *Wigram*, Mr. *Bird*, and Mr. *Rogers*, for the report.—
 In order to raise a trust in favour of Mr. Watson, there ought to be some exhibition of intention on the deed to give him a lien. Although Watson was a surety, yet it is clear that the instrument, on the face of it, does not refer to him as surety. He was, during the whole of the transaction, Henry Wilding's solicitor. Being so, he gets his client to execute a deed which the law says shall have no effect. The Court will not allow a solicitor to call a deed into action for a purpose foreign to the purport of the deed. And although Watson sets out the deed, he does not in the pleadings suggest that it was intended to be executed so as to give him any benefit. Moreover, he says that he received the rents as agent and solicitor. Under these circumstances, upon what principle can the Court say that he, as surety, shall have any benefit from the deed? If he can have no benefit in that character, and we submit he cannot, the deed is one of mere agency, created for the convenience of the debtor, and raises no trust for creditors: *Walkoyn v. Coutts* (a), *Garrard v. Lord Lauderdale*, *Acton v. Woodgate*, *Bill v. Cureton* (b). Considering it in the light of an authority given to an agent, it is an authority revoked by the death of the principal.

The VICE-CHANCELLOR.—I am of opinion that the authorities do not compel me to say that such estate (if any) as became vested in Watson by means of this deed, or by any surrender of the copyhold which may be connected with the deed, can be taken from him without discharging him from the two bonds. I think that upon the present occasion, and as circumstances stand, he has an equity to say so, which must be attended to in this suit.

UPON the exceptions—declare that, without prejudice to any question

(a) 3 Mer. 707 ; 3 Sim. 14.

(b) 2 Myl. & K. 503.

of account, and without prejudice to any allowances which ought to be made to Mr. Watson, the deeds of the 13th and 14th October, 1832, cannot be considered as effectual or binding, save that Mr. Watson is not compellable to reconvey or re-surrender any freehold property included in those deeds, or any copyhold property to which he was admitted in pursuance thereof, until the discharge of the bonds executed by Samuel Wilding and Henry Wilding respectively, for the payment of which Watson was their surety. Neither allow nor over-rule the exceptions.

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March 12th.

The Master was also directed by the decree to inquire whether a certain deed in the pleadings mentioned, bearing date the 13th June, 1831, and made between the testator Samuel Wilding, of the one part, and George Harper, of the other part, was a binding deed in favour of any and what parties, as between Samuel Wilding, or his estate, and his creditors.

By the deed, as set out in the Master's report, after reciting certain mortgages affecting the premises, and various bonds in which Samuel Wilding had become jointly with others, and also severally, bound to pay various sums to various persons named in the deed, it was witnessed that, for the consideration therein mentioned, Samuel Wilding granted, bargained, sold, assigned, and released to George Harper, his heirs and assigns, all and singular the copyhold messuages and hereditaments holden of the manor of Church Stretton, and all his copyhold estates whatsoever and wheresoever, to hold, &c., upon trust (subject to the mortgages) for the better and more effectually securing the repayment of the several sums due and owing, and secured by the several bonds, together with interest for the same respectively, &c.

The Master, by his report, found the existence of these several bonds, in one of which George Harper was himself the obligee. He also found that the deed of June,

Deed of conveyance of land by a debtor to a person upon trust for effectually securing the repayment of certain specified sums due in respect of certain bonds mentioned in the deed—
Held, under the circumstances of the case, to be binding on the debtor as between him and the creditors, although the creditors did not execute the deed.

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1831, after execution, was delivered to George Harper as trustee and solicitor for the bond creditors named in the deed, that he had ever since retained it, and that the creditors were informed of its existence. He further found that the two bonds which were last recited in the deed were for loans of £500 and £800, which George Harper, as the solicitor of Henry Wilding, and also of the lenders, had procured for Wilding, and that he, as solicitor of the lenders had considered that a bond and mortgage would be the proper security for them, and that the 13th June, 1831, had been "appointed for the execution of such securities, forming, in fact, one transaction."

The Master further found, that before the 13th of June, 1831, George Harper was the attorney and solicitor for all the several bond creditors, and that the two bonds for £500 and £800 which were last recited in the deed of the 13th of June, 1831, bore even date with that deed. And under these circumstances, and other circumstances mentioned in the report, the Master came to the conclusion, that, at the time of the execution of the deed in question, Samuel Wilding agreed to secure the repayment of the said sums of £500 and £800 then recently lent to him, and interest, and also the several sums and interest secured by the several other bonds by a mortgage of his freehold and copyhold estate, and accordingly the deed in question was executed.

It further appeared from the report, that, after Samuel Wilding's death, namely, in October, 1832, the devisee in trust under his will had been admitted to the copyholds, and had afterwards surrendered such part of them as were comprised in the deed of June, 1831, to Harper, who was thereupon admitted (subject to the mortgage securities); that Harper was afterwards appointed receiver of the rents of that portion; that he had sold and disposed of divers parts thereof, and continued in receipt of the rents of the

residue, and that he had applied all such rents and proceeds of sales in payment of and keeping down the interest due on the said securities. And the Master found that the deed of the 31st of June, 1831, was a binding deed in favour of the bond creditors, as between the testator Samuel Wilding and his creditors.

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It was stated by Henry Edward Eyson, one of the witnesses upon whose evidence the report was found, that he had ingrossed the deed of June, 1831, as clerk of Mr. George Harper "who was the solicitor of the several creditors therein named, on whose behalf the deed was prepared." The same witness, and others, proved the statement in the report respecting the bonds for £500 and £800, and that the creditors under the other bonds had been informed that the deed of June, 1831, was intended as a further security for their bond debts.

Exceptions having been taken by the plaintiffs to the Master's report, of which the leading one (the sixth) was to the effect that the Master ought to have certified that the deed was not binding in favour of the bond creditors, or binding only on some or one of them, those exceptions now came on for argument.

Mr. *Wigram* and Mr. *Bird*, for the exceptions, relied on the circumstance that none of the bond creditors, except Harper himself, had executed the deed; and that the deed did not appear to have been acted upon until after the death of Samuel Wilding. They referred to *Garrard v. Lord Lauderdale* (a).

Mr. *Spence* and Mr. *Elmsley*, for the report, were stopped by the Court.

The VICE-CHANCELLOR.—An instrument in favour of

(a) 3 Sim. 1.

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creditors, though in form a deed of trust, may have been intended to be an instrument, in effect, of agency—a mere direction to a person in the situation of steward or agent, or in an analogous position, as to the mode of distributing or applying the property of the person executing the deed; without any intention on his part of creating in any other person a right against it. It is established that in such cases, if the Court, having the deed before it, is satisfied that the intention was so, the intention is to have effect given to it, though, in form, the deed be a deed of trust.

But it is not rendered necessary by the authorities on this subject to say that every deed in favour of creditors, to which no creditor is a party, is an instrument of that description. The Court, in each case, must be guided by the particular circumstances; and I accede to the view of the subject taken by Lord *Cottenham* in *Bill v. Cureton* (a). Here, a deed of trust has been created in favour of creditors, to which no creditor is a party. It may belong to one class or the other; if it belongs to one class, I agree with the report; if it belongs to the other class, I differ. The question then is, to which class it belongs.

First, as regards the question of value. It is clear that an antecedent debt may form a valuable consideration for a distinct subsequent transaction, although nothing new proceeds from the creditor. That this is a voluntary deed, is out of the question: it is a deed of trust for a valuable consideration. It is true that the trustee or agent was the solicitor of the debtor executing the deed. It is equally established that he is the solicitor of the creditors in whose favour the instrument professes to be executed, and was so at the time of the execution.

Again, the instrument does not profess to be in favour of all the creditors, or all the creditors of a particular class. It is in favour only of specifically named creditors, whose

(a) 2 Myl. & K. 503.

particular debts or particular securities are also mentioned. Two of these securities of the creditors bear even date with the deed, and it would be a miscarriage not to treat them as the consideration, or part of the consideration, for the deed, and to be read in connexion with it. In one of these securities the trustee or agent is himself the obligee, and there is a statement in the evidence of one of the witnesses that the deed was taken on behalf of the creditors.

Upon the whole, my opinion is, that this was a deed of trust, and not an instrument of agency; that it was given to Mr. Harper and accepted by him, as much for the benefit of the creditors as the debtor; that it was given in respect of antecedent debts; and that, being for value, the *quantum* of value was of no importance. In agreeing, as I do, with certain *dicta* in *Bill v. Cureton*, I express no dissent from any former decision.

Sixth exception overruled.

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COOPER v. PALMER.

Feb. 25th.
March 1st.

JOSEPH PALMER by his will bequeathed the residue of his personal estate to trustees, upon trust to pay the interest, dividends, and annual produce thereof to his wife for her life, and after her decease upon trust, as to one equal third part, for his eldest son Thomas Palmer, and as to one other equal third part, for his youngest son Samuel Palmer, and as to the remaining equal third part, for the

Testator bequeathed the residue of his estate equally between his two sons and his daughter, with a direction that, in case either of his sons should die under twenty-one, or in case his

daughter should die unmarried, the share of the son or daughter so dying should go to his the testator's *two then surviving children*; and that, in case both sons should die under twenty-one, or one son die under that age, and the daughter die unmarried, the share of the second child so dying should go to the only surviving child; and further, that, in case both the sons should die under twenty-one, and the daughter die unmarried, the residue should go over. The two sons attained twenty-one. The daughter survived them, and died unmarried:—*Held*, that there was an intestacy as to the daughter's share.

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testator's daughter Amelia Jane Palmer, during her life, and after her death upon certain trusts for her children, with benefit of survivorship amongst them in certain events; and the testator declared, that, in case either of his said sons should die under the age of twenty-one years, or in case his said daughter should die unmarried, or should marry and afterwards die without leaving issue, then his said trustees should, after the decease of his said wife, raise by sale or sales, of the share or proportion of the residue of his said estate thereinbefore given to or in trust for such son or daughter so dying, the sum of £300, and pay the same to his brother John Palmer, to and for his own use and benefit, and that the remainder of the share of such son or daughter so dying should go to and be equally divided between his two then surviving children, subject, nevertheless, to the like trusts as were thereinbefore declared concerning his or her original third part or share of the said residue of his estate. And the testator further declared, that, in case both his said sons should happen to die under the age of twenty-one years, or in case either of his said sons should die under that age, and his said daughter should also die unmarried, or should marry and afterwards die without leaving issue, then his said trustees should, after the decease of his said wife and the decease of any two of his children so dying as aforesaid, raise by sale or sales, of the share or proportion of the residue of his estate thereinbefore given to or in trust for such second child so dying as aforesaid, the further sum of £400, and pay the same to his said brother John Palmer, to and for his own use and benefit; and that the remainder of the share or shares, as well original as accruing, of such second child so dying as aforesaid, should go and be applied to or for the benefit of such of his said three children as should and would, in the events aforesaid, then be or become his only surviving child, upon and subject nevertheless to the like trusts as were thereinbefore declared concerning his

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or her original third part or share of the said residue of his estate; provided also, and he further declared and directed, that, in case both his said sons should die under the age of twenty-one years, and his said daughter should also die unmarried, or should marry and afterwards die without leaving issue, then his said trustees should stand and be possessed of the said residue of his estate, (subject to the estate for life of his said wife therein), in trust for his said brother John Palmer, if he should be then living, but if he should be then dead, in trust for such person or persons as should be his the said testator's next or nearest of kin, and as would then be entitled to his personal estate in case he had died intestate.

The testator died in 1803, leaving his widow and the three children named in his will surviving him.

The two sons attained the age of twenty-one, and died respectively in 1824 and 1828. The daughter survived them, and died in the year 1835, without having been married. The testator's widow died in 1840.

The shares of the sons in the residue of the testator's estate having been disposed of in two previous suits, the present bill was filed by the surviving trustee and executor under the testator's will, against the personal representatives of the widow and children of the testator, including the assignee under the bankruptcy of Thomas Palmer, praying for the directions of the Court as to the remaining share.

Mr. Spence and *Mr. W. Milne*, for the plaintiff.

Mr. Russell and *Mr. Heigham*, for the representatives of the widow.—The question whether the word “survivors” means “others” cannot arise in this case, because the testator specifies the time at which the survivorship is to take place. In certain events he gives the share to the *then* surviving children. The word “surviving” must,

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therefore, receive its natural construction: *Taylor v. Beverley* (a). The consequence is, that, there being no surviving children, there is an intestacy. The testator has made three different dispositions of this share as applicable to certain events which he specifies; but the event which has happened he has not specified. The word "surviving" refers not to a class, but to individuals. [The *Vice-Chancellor* referred to *Mackinnon v. Sewell* (b).]

Mr. *Cooper* (with him Mr. *Matcham*), for the representatives of the daughter, said, that there was no case in which the word "surviving," coupled with the word "then," had been held to mean "other." He referred to *Leeming v. Sherratt* (c).

Mr. *Lewin*, for the assignee of Thomas Palmer, contended that the word "surviving" meant surviving the age of twenty-one.

Mr. *Kenyon Parker* and Mr. *Craig*, for the representatives of Samuel Parker, referred to *Aiton v. Brooks* (d).

Mr. *Russell*, in reply.

THE VICE-CHANCELLOR:—The only point that has been argued before me in this case is, the question of the title to the capital of one third of the residuary personal estate of the testator in the cause; the third, namely, to which his daughter, now dead, was entitled for her life. It has arisen in these circumstances. His wife, mentioned in the will, and his three children, also mentioned in it, survived him. The three children attained their majorities: the daughter never married. She survived both her bro-

(a) Ante, p. 114.
 (b) 2 Myl. & K. 202.

(c) 2 Hare, 14.
 (d) 7 Sim. 204.

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thers, but died in the lifetime of the widow, who, as I collect, never remarried, and is also now dead. On one side, it is said that the third in question belongs to the estate of the two sons; on the other, that the will has not disposed of it beyond the daughter's life interest in the events that happened, as I have mentioned; in which case, of course, it belongs, as to a third, to the estate of the widow, and as to the other two-thirds, to the estates of the three children, who were the sole next of kin at the death of the testator.

It appears to me, that the latter position is the true one. It must be so, unless the words "my two then surviving children" can be read "my two other children"—a reading which is said to be authorized by the context, and especially by the words "in the events aforesaid, then be or become my only surviving child"—occurring some way below those first quoted. In addition to which, the words "benefit of survivorship," used as to the daughter's children, may be noticed.

I cannot, however, accede to this argument; which asks, I think, too great a liberty to be taken with the actual language of the instrument. Adhering to what I am reported to have said in *Taylor v. Beverley*, I conceive that the words in question of the present will must have their correct and ordinary meaning attributed to them, the context not in my judgment requiring or sufficiently pointing to a different interpretation of them; and, according to that correct and ordinary meaning, the testator has not disposed of the capital of the daughter's share in the events which have happened—events that (whether he did or did not foresee or think of them) he has in my judgment omitted to provide for. I suspect that, if he could be asked what he intended, or would have intended, if the possibility of the events that have happened had occurred to his mind or been brought under his attention, his answer would be unfavourable to the decision which I pronounce; but I can look only to the language of the instrument.

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Feb. 15th.

Bankers take from a customer an equitable mortgage by deposit of title-deeds. The property comprised in the deeds is subject to a trust of which the bankers have no notice, and the deposit is made in breach of that trust. The trust must prevail against the bankers' lien.

A sum of £3000 is paid to a person out of the Court of Chancery upon his undertaking to apply £2000 of it in the purchase of a suitable house for himself and wife, which he is to convey to the trustees of his marriage settlement upon certain trusts, and to apply the remaining £1000 in setting himself up in business. Upon the receipt of the £3000 he pays the whole to his bankers. He afterwards draws out nearly the

whole amount in various sums at various times. Amongst the drafts is one which he delivers in payment for the purchase of a house suitable for himself and wife. Having procured the house to be conveyed to himself in fee, he deposits the title-deeds with his bankers, as a security for advances, without notice to the bankers of the trusts of the settlement. In considering the conflicting claims of the bankers and the trustees of the settlement with respect to the house, it must be presumed that the purchase-money for the house was paid out of that portion of the £3000 which was properly applicable to that purpose.

MANNINGFORD v. TOLEMAN.

IN October, 1830, John Seymour Cock, who carried on business as a cabinet-maker, at Bristol, married Clarissa Foxon, of the same place, who was a ward of this Court, and entitled to considerable real and personal estate, the latter being in the custody of this Court in a cause of "*Foxon v. Foxon*."

In March, 1831, the Master, to whom the cause of "*Foxon v. Foxon*" was referred, made his report, by which he stated that the friends of Mrs. Cock and her husband were desirous that Cock should commence business as a timber merchant, and that it was desirable that a proper house should be purchased for him and his wife; and that Cock had proposed that £3000, part of his wife's fortune, should be raised and paid to him out of the trust funds, whereof £2000 should be paid to him to enable him to purchase a proper house and furniture for himself and his wife—such house and furniture when purchased to be conveyed and assigned to trustees, upon trust for the benefit of his wife and also of himself, in case he should survive her and there should be no child of the marriage—and the remaining £1000 should be retained by himself, to enable him to commence and carry on the trade or business of a timber merchant. And the Master stated that he approved this proposal.

The Master's report having been confirmed, and it having been referred back to him to approve of a settlement, an indenture of settlement, dated the 8th of June, 1831, was executed by the husband and wife, who was then of

age, and certain trustees, and in that settlement the husband covenanted with the trustees that the house and furniture then intended to be purchased by the husband with the £2000 should, when and so soon as the purchase thereof should have been completed, be effectually conveyed and assured by the husband, with or without the wife, to the trustees in trust for the wife for life, and to her separate use during coverture, with remainder to the children in strict settlement, with an ultimate limitation to the husband in fee in the event of his surviving his wife, and there being no children of the marriage.

By the same order by which the Master's report was confirmed, it was ordered, that, upon the Master certifying the due execution of the settlement, the sum of £3000 should be paid to the husband to be by him applied in manner stated in his proposal. Accordingly, the Master having certified to the above effect, the sum of £3000 was, on the 2nd of August, 1831, paid by the Accountant-General to J. S. Cock.

On the following day, the 3rd of August, J. S. Cock opened an account with Stuckeys' Banking Company at Bristol, and deposited with them the sum of £2900. He also, in the course of the same month, deposited with them a bill in his favour for £50, payable in November following; but he made no other payments to the Bank. During the same month of August he drew out the whole amount of £2900, except 4*l.* 14*s.* 6*d.*, by drafts for various sums; one draft of the 25th of August being in payment for a house in St. James's Place, Bristol, of which he took a conveyance, by indentures of the 24th and 25th of August, to himself in fee, and of which he and his wife were for some time in the occupation.

The money so lodged at the Bristol Bank having been thus expended, and the bankers having refused to make to Cock any advances of money without security, he, on the 3rd of September, 1831, deposited with them the title-deeds

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of the house in St. James's Place, and at the same time signed a memorandum to the effect that the deposit was made as a security for any balance which he might then or at any future time owe to their concern.

On the footing of this deposit, advances were made by the bankers to Cock, and after giving him credit for the £50 bill, they claimed against him for principal and interest the sum of £376.

Cock afterwards took the benefit of the Insolvent Debtors' Act. In the meantime the trustees, having received notice of the bankers' claim, obtained from Cock a conveyance to themselves in fee of the mortgaged premises.

The bill was filed by the registered public officer of the Bank against the assignee of Cock under the Insolvent Act, the trustees of the settlement, and Mrs. Cock and her children, and it prayed that the Banking Company might be declared equitable mortgagees of the house in St. James's Place, and consequential relief as against the several defendants.

The defendant, Mr. Cock, and the trustees, by their answers, insisted on the prior equity of the wife and children under the settlement.

Some evidence was entered into on the part of the defendant Mrs. Cock, to shew that the bankers when they took the deposit had notice of the settlement; but in the view taken by the Court, this evidence was unnecessary.

Mr. *Wigram* and Mr. *Blunt*, for the plaintiff.—It is not disputed by the trustees, that when they took the conveyance they had notice of the bankers' lien; but they insist that they had a prior equity. There is no evidence, however, to shew that the house was bought with the £2000. Why was it bought with the £2000 rather than the £1000? The whole £3000 was paid to Mr. Cock in one mass. That sum, or the greater part of it, was paid by him into the bank. He then drew upon the bank for sums of various

amounts; but it is impossible to say that the drafts are to be attributed to any specific portion of the money originally paid by him. If the trustees have a better equity than the plaintiff, they must shew that the £2000 was laid out on the house. Cock's covenant only was, that if he laid out the £2000 on a house it was to be settled in such a manner. He did not covenant to purchase a house out of any funds he might happen to have.

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Mr. *Cooper* and Mr. *Lean*, for the defendant Toleman, the assignee under the Insolvent Act.

Mr. *Russell* and Mr. *Collins*, for the defendant Mrs. Cock.

Mr. *Simpkinson* and Mr. *Piggott*, for the trustees.

It was agreed at the bar, that, if the question had only been between the trustees and the parties interested under the settlement, the purchase of the house would have been proper for the purposes of the settlement.

The VICE-CHANCELLOR.—The house in question is admitted to have been purchased with part of the £3000. The purchase is admitted to have been proper and in due performance, so far, of the purpose for which the £2000 had been intrusted to Mr. Cock, namely, to purchase a suitable house for himself and his family. The £1000 beyond the £2000 was to be applied for the purpose of establishing himself in the business of a timber merchant. Each part of the money was thus appropriated to a particular object. The money was received by him in London on the 2nd of August. He seems to have retained £100, and paid the remaining £2900 into the bank represented by the plaintiff.

Upon the 25th of August he completes the purchase of the house, and pays the purchase-money by delivering a

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cheque of that date, the 25th of August, upon his bankers, on which day his credit with the bank consisted of the £2900 and a short bill for £50. The only cash, however, which had been paid to his credit was the £2900. This being the whole of his account on the credit side, there had been drawn out before this date the sum of 930*l.* 7*s.* 10*d.* The question, I apprehend, which, if the matter were before a jury, would be put to the jury, is this :—The purchase having been made out of the £3000, what is the just inference of fact with respect to the portion of the money out of which the purchase was made? I think that the just and unavoidable inference is, that the payment for the house was made out of that part of the money which it was proper and right so to apply, that is to say, the £2000. I think, therefore, that at the moment of the purchase a trust was fastened upon the property. Consistently with all the authoritative decisions since the Statute of Frauds, the estate was bound by the trust. Cock was as completely a trustee of it as if he had executed a declaration of trust, not conveying the legal estate. The trustee thus holding the trust property pledges it for a debt of his own. According to the principles of this Court and the course of decision, the prior trust must prevail. There was no subsequent acquiescence on the part of any person beneficially interested. There is not the least ground for implicating Mrs. Cock as a consenting party to the transaction, and the children are infants.

I decide this case on the assumption that the bank had not their attention called to the circumstances in which the property stood. Whether they had or had not notice of the settlement is, in my view of the case, immaterial.

The *Vice-Chancellor* then asked the plaintiff's counsel whether their client was willing to give up the deeds.

Upon receiving an answer in the affirmative, his Honor said, that, upon the plaintiff giving an undertaking to that effect, the bill should be dismissed without costs.

THE plaintiff undertaking to deliver up the deeds and the memorandum to the trustees within a week, let the bill be dismissed without costs; the costs of the defendants the trustees to be taxed as between solicitor and client; and let the costs of the trustees, and of Mrs. Cock and her children, be paid out of the corpus of the settled property.

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MANNING-
FORD
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TOLEMAN.

COLLINS v. REECE.

Jan. 27th.
Feb. 10th.

BY an indenture dated the 10th September, 1840, and expressed to be made between Younger Hooper, of the first part; the defendant Richard Reece, of the second part; and all the creditors of the said Younger Hooper, whose hands and seals were set and affixed to the said indenture, of the third part; all the personal estate and effects which the said Younger Hooper was then possessed of or entitled to, and interested in, except the wearing apparel of himself, his wife and children, were assigned to the defendant, his executors, administrators, and assigns, upon trust to sell or dispose of, and convert into money, such parts as did not consist of money, and out of the produce thereof, and such parts as did consist of money, to pay and retain the expenses attending the preparing and perfecting the said indenture, and all expenses which should be incurred in and about the trusts thereof, and, out of the surplus or residue, to pay such rents, rates, taxes, and servants' wages as might be due from the said Younger Hooper, and to apply and divide the remainder to and amongst all the creditors of the said Younger Hooper, who should execute the said

Assignee of A., under a deed of assignment and trust, for the benefit of A.'s creditors, decreed, under the circumstances of the case, to pay the costs of a suit for an account brought against him by the assignee of A., under the Insolvent Debtor's Act.

A. executes a deed of assignment of his effects to a trustee for the benefit of all his creditors who shall sign or assent to the deed within three months after the date of it:—*Quære*, whether, in the view of a court of equity, a creditor who

does not sign or assent to the deed until after the expiration of the three months can take any benefit under it.

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indenture or assent thereto within three months from the date thereof, in equal proportions, and according to their respective debts.

This deed was executed by Hooper and the defendant. Soon after the date of it, Hooper, by virtue of a writ of *ca. sa.* issued against him at the suit of the plaintiff, was arrested and lodged in Hereford Gaol, and under the stat. 1 & 2 *Vict.* c. 110, s. 36, the plaintiff, as a detaining creditor of the prisoner, applied to the Court for the Relief of Insolvent Debtors for an order to vest the prisoner's property in the provisional assignee of that court. Accordingly, by an order of that court, dated the 26th December, 1840, all the real and personal estate of the prisoner was vested in the provisional assignee for the benefit of the creditors; and by a subsequent order of that court, dated 20th February, 1841, the property became vested in the plaintiff, as assignee under the Insolvent Act.

In March, 1841, the plaintiff applied by letter to the defendant, who was a clerk in the office of his brother, a solicitor, to deliver to him a correct account of the insolvent's estate, at the same time offering to allow the defendant all legal payments made by him as assignee under the deed of assignment. To this letter a reply was sent by the brother, stating that the plaintiff's letter had been laid before a special pleader, but that he would send a reply when the pleader's sentiments were known. No reply, however, was ever sent, nor was any account delivered, though the plaintiff sent two further letters to the defendant, in the latter of which he gave him notice, that, unless an account were delivered, the plaintiff had instructions from the creditors under the insolvency to file a bill against him.

In May, 1841, the present bill was filed, praying accounts of the receipts and disbursements of the defendant under the deed of assignment.

By the decree made at the hearing of the cause, the

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Master, with reference to certain payments which the defendant, by his answer, alleged to be good payments, was directed to inquire when the several creditors of the insolvent who executed the indenture of assignment first executed it, and when such creditors first assented to it.

The Master, by his report, certified that certain creditors whom he named, and whose debts amounted to 32*l.* 10*s.* 11*d.*, had been paid by the defendant their respective debts, and had signed and assented to the indenture of assignment on certain days in the months of January and February, 1841; but the Master stated that he conceived, that, after the vesting order had been made in the Insolvent Debtors Court, (of which it appeared that the defendant had due notice), all the property of the insolvent comprised in the indenture of assignment of the 10th September, 1840, and then remaining unapplied and unappropriated to the creditors who had then executed or assented to that deed, became, by virtue of such order, vested in the provisional assignee for the benefit of all the creditors of the insolvent who had not then executed the said indenture or assented thereto, and therefore any payment made by the defendant as such trustee under the said indenture, subsequently to the date of the said order, would not be a proper payment; and it appearing that the several sums, making together 32*l.* 10*s.* 11*d.*, were respectively paid to the creditors who did not assent to the said trust until after the date of the said order and more than three months after the date of the said indenture, he was of opinion that the same were not properly paid, and he had not, therefore, allowed the same in taking the account.

Exclusively of this sum of 32*l.* 10*s.* 11*d.*, the Master certified the sum of 91*l.* 17*s.* 1*d.* to be due from the defendant to the plaintiff on the balance of the account, although the defendant had set forth in his answer an account from which it would appear that nothing was due; having credited himself with, amongst other matters, an item of

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82*l.* 12*s.* 8*d.* as the amount of his solicitor's bill of costs for carrying out the trusts of the assignment, which item was reduced by the Master to 27*l.* 15*s.* 9*d.*

The cause now came on for hearing for further directions.

Mr. *Wigram* and Mr. *Piggott*, for the plaintiff.

Mr. *Osborne*, for the defendant, contended, that the payments made by the defendant, amounting to 82*l.* 10*s.* 11*d.* were good payments in equity, notwithstanding that the creditor to whom those sums were paid had not signed or assented to the deed within the three months limited by it for that purpose: *Dunch v. Kent* (a), *Spottiswoode v. Stockdale* (b), *Jolly v. Wallis* (c). [The *Vice-Chancellor*.—Suppose, upon the last day limited by the deed for execution, a creditor, finding that but a few other creditors have signed or assented to the deed, signs it; is he to be prejudiced by all the other creditors who subsequently sign or assent? Possibly there may be some inaccuracy in the report of *Spottiswoode v. Stockdale*. Lord *Eldon* is stated to have said that the plea in that case “relies on the non-execution merely;” but on looking at the plea, as stated in the same report, does that appear to have been the case?]

Mr. *Wigram*, in reply.

The VICE-CHANCELLOR said, that, whatever might ultimately become of the question as to the 32*l.* 10*s.* 11*d.*, it was clear from the conduct of the defendant in not delivering his account, that he must be charged with some of the costs of the suit. His Honor, however, was of opinion, that the defendant was not without excuse in having raised the question as to the 32*l.* 10*s.* 11*d.*, which

(a) 1 Vern. 260.

(b) G. Coop. 102.

(c) 3 Esp. 228.

was not an irrational question, or one merely litigious. That point was worthy of consideration, and must, of course, be decided, notwithstanding the small amount of the sum involved in it, unless the parties in the meantime should come to some arrangement.

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The VICE-CHANCELLOR.—The question in this case relating to a sum of 32*l.* 10*s.* 11*d.* having been settled by compromise between the parties upon the terms of half of it remaining disallowed to the defendant, and the other half being allowed to him in diminution of the balance reported due from him, that question is now immaterial, except as bearing upon the costs, which, and a claim made for interest, are the only matters left for me to decide. As to interest, I think, that, under all the circumstances, justice will be done to each party by not charging the defendant with interest upon the 32*l.* 10*s.* 11*d.*, or any part of it, and by charging him as to the residue of his balance with simple interest at *£4 per cent. per annum*, from the time of filing the bill.

Feb. 10*th.*

The compromise to which I have referred was made without prejudice to any question respecting the costs of which I have now to dispose, and with reference to which I have not found it necessary to form an opinion, whether, had the compromise not taken place, I should or should not have charged the defendant with the 32*l.* 10*s.* 11*d.* It was, I think, a question not without difficulty, whether he had or had not a right to make the payments of which that sum was composed. It was not, however, a prudent step on his part to make those payments under the circumstances which existed when he made them; nor, looking at the whole of the materials before me, am I able to consider that he took that step merely because he considered it his duty to do so. It would have been at least as well if he had sought good advice on the subject before

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so acting. Nor do I infer from the papers, or think it probable that a relinquishment by the plaintiff of this point before the commencement of the suit would have prevented litigation. The dispute was never brought to that simple question. The plaintiff repeatedly asked, as he had a right to ask, the defendant for his accounts. The defendant did not, it may indeed be said that he would not, furnish his accounts. The application for them having begun in March, the bill was filed on the 22nd of May, 1841, not, I think, too early, not improperly, not unnecessarily, whatever may have been the strict state of the rights of the parties as to the 32*l.* 10*s.* 11*d.* When, in addition, the nature and allegations of the defendant's answers, the claims made by him on behalf of himself or of his brother and solicitor, whose clerk he is or was, or on behalf of both, and the difference (independently of the 32*l.* 10*s.* 11*d.*) between the accounts as reported by the Master, and the accounts as stated by the defendant, are considered, the just result is, I think, his liability to the costs of the suit, subject to this qualification—that, so far as those costs have been increased by the question raised as to the right of the defendant to be allowed the payments composing the 32*l.* 10*s.* 11*d.*, and by means of the evidence into which the plaintiff entered before the original hearing having been taken before, instead of being taken after, the decree, there should in those two respects be no costs on either side.

HUDSON v. BRYANT.

1845.

Feb. 18th,
19th.

March 1st.

JOHN MORLEY began his will with some well-composed and well-spelt expressions of a religious character, and proceeded as follows:—"As touching such worldly estate wherewith it has pleased God to bless me in this life, I give, demise, and dispose of the same in the following manner and form:—First, I give and bequeath to Susannah Morley, my dearly beloved wife, the sole executrix of the whole of my property, should she, please God, be the longest liver, and should my property be more than she wants to live on for her life-time, she is from my hand desired by me to give weekly the remainder to my two daughters, Anna Maria Hudson, and Elizabeth Butler, so long as she lives. The hole of my property to be sold. John Morley. Witness my hand, 1st February, 1834. John Morley."

Then followed these words on a subsequent page:—

"And the money to be put into the Bank of England, or any other, in trust, as may be thought best for her and those in trust. 1836, 3rd February. Witness, Henry Ansell Albuy. Witness, Edward Collin Albuy."

The testator left his wife, and the two daughters named in his will, who were daughters by a former wife, and his only issue, surviving him.

The testamentary instrument was proved by the wife as an entire will, and not as a will and codicil.

The wife died in 1843, having by her will appointed the defendants her executors.

The bill was filed by the daughters and the husband of one of them, the husband of the other being dead, for the purpose of having the trusts of the will carried into execution; and the question at the hearing of the cause

A testator, possessed of personal property, gave a beneficial and apparently absolute interest in it to his wife, whom he made his sole executrix; but with a direction that, in case his property should be more than she wanted to live on for her life-time, she was to give weekly the remainder to the testator's two daughters, so long as she lived; and he directed the whole of his property to be sold, and the money to be put into the Bank of England, in trust as might be thought best for her and those in trust:—*Held*, that the wife took beneficially an interest for life only, that the gift to the daughters was invalid, and that there was an intestacy as to the beneficial interest in the capital after the widow's death.

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was, whether the wife took an absolute interest or only an interest for her life in the testator's property.

Mr. *Simpkinson* and Mr. *Shelford*, for the plaintiffs.—The *corpus* of the property is given to the wife as executrix, and that is declared to be subject to certain trusts which are inconsistent with a gift to her own absolute use. If she is to have the property absolutely, why direct the money to be placed in the Bank of England? Taking the whole will together, the intention of the testator was, that his wife should have a life interest either in the whole or in such part of the property as was required for her living: she was “to live on it for her life.” For that purpose the property was to be invested. If the income was more than sufficient for her own use, she was to deal out the remainder week by week to the testator's daughters. To hold that she took absolutely would be to reject all the latter part of the will; in which it is plain that the word “her” refers to the widow and “those in trust” to the daughters. [The *Vice-Chancellor*.—You consider, that, in the sentence “and should my property” &c., the word “property” means income; but the testator afterwards directs the whole of his “property” to be sold.] In a will of this description it is not unreasonable to conclude that he used the word in different senses. Supposing he did, it is submitted that the words are sufficient to raise a trust for the daughters: *Mason v. Limbury* (a), and the other cases cited in *Roper* (b). But supposing the Court should think the trust void for uncertainty, then the daughters will take as next of kin of the testator: *Morice v. Bishop of Durham* (c), *Fowler v. Garlike* (d), *Ellis v. Selby* (e), and the cases there cited.

(a) Ambl. 4, cited.

(b) Vol. 2, p. 373. (Ed. White).

(c) 10 Ves. 522; 537.

(d) 1 Russ. & M. 232.

(e) 1 Myl. & Cr. 286.

Mr. *Wigram* and Mr. *Southgate*, for the defendants. The first words of the will shew that the testator had it in view not to die intestate as to any part of his property. The word "if" before the words "the whole" must be omitted. The gift is absolute to the wife, subject to a trust for the daughters, which is void for uncertainty. The wife, therefore, took the whole: *Ross v. Ross* (a), *Bull v. Kingston* (b).

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Mr. *Simpkinson*, in reply.

The VICE-CHANCELLOR.—The short but obscure will of the testator in this cause has to be construed by the Court in these circumstances. The testator left personal property only. His wife and two daughters mentioned in the will survived him. The widow is dead. She was not the mother of the daughters; who were, probably, but are not yet proved or admitted to have been the testator's sole next of kin at his death. The will is in these words: [His Honor read the will.]

March 1st.

It appears from the affidavit annexed, to have been wholly written by the testator himself, and probably in 1834, though the persons subscribing as witnesses wrote their names in February, 1836, which latter date was then written by one of them. The preamble of the will was probably taken from some book or form. The rest seems likely to have been purely the testator's own. The passage beginning with the words "and the money to be put," though forming part of the will, is not on the same page with the rest, and is not followed by any signature of the testator, who probably or possibly intended to make some addition to the will never made.

The question, or the first question, is, whether the widow did not, according to the true construction of the will, become entitled to the entire property for her absolute

(a) 1 J. & W. 154.

(b) 1 Mer. 314.

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benefit. I have felt some difficulty as to this point, but after much consideration of this singular instrument, and some hesitation, I have formed the opinion that it gives her beneficially a life interest and no more. The word "weekly," and the references to her life, seem to me to justify this conclusion, though requiring, it may be, that the word "property" should be treated as used by the testator in one place with one meaning, and in others with another. If the directions as to the sale and investment are of any materiality, they bear, I think, rather against than for the widow, and though the will, in the commencing part of it, has a declaration of intention to dispose of the whole of the property, yet the word "first" immediately following the words "manner and form" is to be attended to, nor am I satisfied that, when the words on the second page of the will, written by the testator, were written, he meant the will to end there, though, in fact, he added nothing afterwards. And the word "of" immediately following the word "executrix" ought not to be without necessity disregarded. But has he disposed of the beneficial interest in the capital? This may depend on the meaning of the words "those in trust." Unless they refer to the two daughters, they seem to me unmeaning and ineffectual. If they do refer to the daughters, they seem to me to do so in respect of the precarious and invalid direction for their benefit contained in a previous part of the instrument, and not in respect of any other benefit or right; and, as I think that the reference to the wife by the word "her" in the same passage of the will ought to be read as being in respect only of the provision for her in the foregoing part of it, which gives her, in my judgment, only a life interest, the result is, that there appears to me to be an intestacy as to the beneficial interest in the capital after the widow's death, and that she and the next of kin took it accordingly by intestacy, subject to her life interest.

Thinking this case one of some embarrassment, I have consulted three judges upon it. They have been so good as to favour me with their opinions, of which one differs, and the other two agree with mine. One of the two learned Judges who agree with me (not a judge of this court) thinks that the words "the whole of my property to be sold" contain the accusative case required and governed by the words "I give and bequeath," thus treating much of the intervening language as inserted parenthetically in effect. This reading (very possibly the true reading) does not seem to be thought by the learned Judge, and is not considered by me, essential to the conclusion at which we have arrived. The testator, an illiterate farmer, probably thought little or not at all, and knew little or nothing of grammar or syntax. He has thrown a heap of words together, the particular connexion strictly existing between which is not, nor is their order or arrangement, of much importance. A celebrated author says, truly enough, "We make a countryman dumb, whom we will not allow to speak but by the rules of grammar." The question upon a will, and especially such a will as the present, is of the effect of the whole, as a whole. Its parts may not be in their regular places, but, as has been said of good and evil, where they "lie shuffled together in a confused heap," "study must draw them forth and range them." It is not contrary to legitimate interpretation to read the clauses of which a will consists, as in a different order from that in which they stand written, and if the result of all the passages combined is to convey to the understanding a definite intention as entertained by the writer, that intention, being lawful, must, however awkwardly expressed, prevail.

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1845.

March 7th,
10th, 14th.

Upon the construction of a will, *held*, that the executors were not entitled to a beneficial interest in the testator's residuary personal estate.

ANDREW v. ANDREW.

THOMAS ANDREW, of Harpurtrey, in the parish of Manchester, by his will dated the 29th October, 1832, after devising certain real estates at Harpurtrey and other places, to his natural son Thomas Andrew and his issue, bequeathed as follows:—"I give and bequeath unto my sister Eliza Andrew, to be paid out of the rents and profits of the aforesaid lands, the sum of £250 *per annum*, and to live free from rent in the house I now occupy in Harpurtrey, with the lands and buildings I now occupy, containing about nine Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages, and horses, cows, hay, and farming utensils, and stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either events then to go to my natural son Thomas Andrew; but, should she marry, then my will and mind is, that my executors shall pay her £100 *per annum* for her own use during her natural life, out of the rents and profits of my said estate. And I direct that my executors, at my decease, shall take an inventory of all my said furniture and stock, and to give my said sister a copy; that no waste shall be made except in the consumable articles. I also give and bequeath unto my brothers Jonathan Andrew, Edward Andrew, James Andrew, and my sister Mary Ann Green, each £100 *per annum* during their natural lives, to be paid by my executors out of the rents and profits of the before-mentioned lands, tenements, and hereditaments, and, at their or any of their decease, to go to my natural son Thomas Andrew. I also give and bequeath to my natural son Henry Andrew, &c. [Here followed a devise of an estate at Manchester to Henry and his issue.] I also give and bequeath unto my brother George Andrew my thirty freehold houses with their appurtenances at Comp-

stall, in the county of Chester, for ever, subject, nevertheless, to him paying out of the rents and profits £100 *per annum* unto my brother John Andrew during his natural life. All the annuities I have made chargeable upon my before-mentioned estates to be paid half-yearly every 24th June and 25th December. I also give unto my brother Jonathan Andrew all the money and interest thereon due to me at my decease which he had from me in my lifetime; my executors retaining his life interest in the Guardian Life Insurance Office for the purpose I shall hereafter order. I also give unto my brother Edward Andrew the land he now occupies, part of Barlow estate. I also give unto my executors all my personal property which shall be applied to the payment of all my interest, debts, and mortgages I owe at my decease; and I do appoint my natural son Thomas Andrew, my natural son Henry Andrew, and Samuel Broadbent, son of my friend James Broadbent of Pentleton, executors of this my will."

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 v.
 ANDREW.

The testator died in December, 1843, a bachelor, leaving the several persons named in his will surviving him; his sister Eliza having, in April, 1842, married the Rev. Horatio James.

The executors proved the will, and entered upon the execution of the trusts.

The bill was filed by George Andrew, the testator's eldest brother, and one of his next of kin, against the executors and the other next of kin, praying that the testator's personal estate might be duly administered.

The cause now came on for hearing.

Mr. Wigram and *Mr. J. H. Palmer*, for the plaintiff.

Mr. Teed and *Mr. Torriano*, for the defendant Thomas Andrew.

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Mr. Russell and Mr. Hall, for the defendants Henry Andrew and Samuel Broadbent.

Mr. Temple and Mr. Bacon, for the defendants Mr. and Mrs. James.

Mr. Elderton, for other parties.

The first question raised was, whether the testator's personal estate was liable to answer the annuities : this point, however, was given up on the part of Thomas and Henry Andrew, the devisees of the real estates.

The next question was, whether the executors were beneficially entitled to the residue.

For the executors, it was contended, that the express gift to them was mere surplusage, unless it was intended to take effect beneficially, and that the statute 11 Geo. 4 and 1 Will. 4, c. 40, by which executors are constituted *prima facie* trustees of the residue, does not apply to the case of an express gift to them. The cases of *Hill v. Bishop of London* (a), *King v. Denison* (b), and *Walton v. Walton* (c), were cited.

March 10th. The VICE-CHANCELLOR. — The question whether the executors are entitled beneficially to the residuary personal estate is one of some nicety, and not unlikely to be viewed differently by different minds. The gift to them is in terms of all the personal estate, not of all the other personal estate, or of the personal estate not before disposed of.

It is true, that, where the testator mentions the names of the executors, he describes two (for whom provisions are

(a) 1 Atk. 618. (b) 1 Ves. & B. 260, 272. (c) 14 Ves. 318, 322

otherwise made by the will) as his natural sons, and the third as the son of his friend. It is true, also, that the commencement of the gift to them is similar to the commencement of other gifts in the will undoubtedly beneficial, and that there are clearly beneficial gifts in it subject to charges: nor is it unworthy of observation, that, upon the construction maintained by the next of kin, the whole gift to the executors is without operation, not effecting any purpose beyond that effected by the mere appointment to the executorship. It is, however, equally true, that, in the gift to the executors, they are designated by their office merely, not by their names, that the purpose of paying debts and mortgages may be thought to be expressed as if it were meant or expected to exhaust the whole subject of the gift, and that the testator's intention as to an insurance (probably on the life of his brother Jonathan) appears to have been reserved or uncertain, and that he may be argued not to have intended it for the executors.

These seem the principal remarks on each side to which the will is liable. Upon its whole language and the authorities, (those to which the executors' counsel referred and some others), I have had to ask myself whether the gift to the executors was a gift only for a particular and limited purpose, or a general gift subject to a charge. Having found myself unable to say that this is a general gift subject to a charge, I have come to a conclusion in favour of the next of kin.

The cases of *Pratt v. Sladden* (a), *Dawson v. Clark* (b), and *Southouse v. Bate* (c) contain, as is well known, very valuable observations of Sir *W. Grant* and Lord *Eldon*, upon cases of this kind. I have been reading them with attention, and desire to be understood as not giving any opinion how the title to the residue would have stood, in the present in-

(a) 14 Ves. 193.

(b) 15 Ves. 409; 18 Ves. 247.

(c) 2 Ves. & B. 396.

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 ANDREW
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stance, had the statute mentioned at the bar, which did not exist when those cases were decided, not been passed: it forms part of the law under which the will before me takes effect. Nor do I say who would have been entitled to the residue if the gift in question had been, not to the executors, but to other persons, the language of the will in all other respects (including the appointment of executors) standing as it does. Upon neither of these hypothetical questions can it be necessary to form a judgment.

As the will and the law stand, I construe the will as I have said.

Testator, after devising a real estate to his natural son T. A., bequeathed as follows:—

“ I give and bequeath unto my sister E., to be paid out of the rents and profits of the aforesaid lands, the sum of £250 *per annum*, and to live free from rent in the house I now occupy in H., with the land and buildings I now occupy, containing

about nine Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages and horses, cows, hay, and farming utensils, and stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either events, then to go to T. A.; but should she marry, then my will and mind is, that my executors shall pay her £100 *per annum*, for her own use, during her natural life, out of the rents and profits of my said estate.” The sister married in the testator’s lifetime:—*Held*, that the consumable articles did not go to T. A., but fell into the residue; and that the annuities of £250 *per annum* and £100 *per annum* were not cumulative.

If a testator bequeaths a legacy to A., so long as A. shall remain unmarried, and A. marries in the testator’s lifetime, the legacy, as regards A., is in the nature of a lapsed legacy.

If a testator bequeaths consumable articles to A. for life, with a limitation over by way of remainder to B.; as the gift to A. is absolute, the limitation to B. cannot take effect, even though A. die in the testator’s lifetime.

ANOTHER question was, to whom, in consequence of the marriage of the testator’s sister Eliza, the consumable articles comprised in the bequest to her belonged.

For the plaintiff it was contended, that, if she had survived the testator, unmarried, she would have taken an absolute interest in these articles; *Randall v. Russell* (a), *Proctor v. Bishop of Bath and Wells* (b); and therefore the gift over to Thomas, which was never intended to take effect until the death or marriage of the sister, was void. And if it was void in its creation, it could not be rendered valid by the circumstance of the prior gift having failed by a species of lapse: *Harris v. Davies* (c). In *Mackinnon v. Peach* (d)

(a) 3 Mer. 196.

(b) 2 H. Bl. 358.

(c) Ante, p. 416.

(d) 2 Keen, 555.

the survivor was probably considered to take absolutely by force of the gift.

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For the defendant Thomas Andrew it was contended, that, if Eliza James had survived the testator, it was not clear that she would have taken an absolute interest in the consumable articles; *Foley v. Burnell* (a), *Porter v. Tournay* (b); but, admitting that she would, the gift to Thomas was substitutional, and not by way of remainder.

For the defendant Eliza James it was contended, that her legacy could not be considered as having lapsed by her marriage in the testator's lifetime, death alone causing a lapse; and that, if such construction were held, the effect would be to strike out of the will the words "during her natural life."

The VICE-CHANCELLOR. — I regret the conclusion to which, according to my view of the words, I find myself obliged to come.

Upon the propriety of the rule, that the gift of the use and enjoyment of consumable articles for life is the gift of the absolute interest, I do not know that I have ever thought; because I have considered it as settled in this court for many years. That such is the rule, appears to me clear, and I must act upon it.

According to my view of the case, therefore, the gift of the wine, spirits, and hay to Eliza Andrew would have been absolute, as she survived the testator, if she had not married in his lifetime. She did marry in his lifetime; and, as the gift to her was only so long as she should remain unmarried, it never took effect: and without using the word "lapse," the consequence is the same, so far as she is concerned, as if she had died in the testator's lifetime.

(a) 1 Bro. C. C. 275.

(b) 3 Ves. 311.

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The next question has been said to be, whether the gift over is substitutional or by way of remainder. As it is, I apprehend, clear that if there be a gift to A. B. and his heirs, and if he die without heirs, to C. D., not a relative of the first devisee, the gift over is void, so, it is equally clear, that if the testator had said, "if A. B. die in my lifetime, I give to C. D.," and A. B. had died in his lifetime, the gift to C. D. would have been good.

But there is in this will no express reference to the happening of any event in the testator's lifetime: he says, "in either events, then to go" &c. It is true that death at some time is certain and not contingent, and death at a designated time contingent and not certain: but though he has said "events," he means, upon or after death *or* marriage, that is, death or marriage whensoever happening. He did not mean death or marriage happening only in his lifetime. The words were intended to operate by way of remainder. It is a gift to her so long as she shall be living unmarried, and then over. Now the gift of consumable articles to a woman, so long as she shall be living unmarried, is the gift of an absolute interest. The gift over, therefore, is void, nor rendered valid by the circumstance of the legatee having survived the testator and married in his lifetime. These consumable articles fall into the residue.

It was then argued on the part of the defendant Mrs. James, that the annuity of £250 *per annum* had not ceased by her marriage, and that that annuity and the annuity of £100 (the latter being given, as was contended, in compensation for the loss of the specific chattels only) were cumulative.

The VICE-CHANCELLOR.—I agree that a gift of an annuity in general terms, without any express limit to its duration, is generally a gift to the annuitant for life merely:

still the place in this will where the words “during her natural life, or so long,” &c., occur, is not unworthy of observation. They follow the enumeration of all the gifts to the sister except the £100 *per annum*. I am of opinion that plainly the gift of the £250 *per annum* to the sister was meant to cease upon her marriage, and, as she married in the testator’s lifetime, never arose, but that she is entitled to the annuity of £100 *per annum*.

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MONTRESOR v. MONTRESOR.

SIR HENRY MONTRESOR, K. C. B. and G. C. K., of Denne Hill, in the county of Kent, wrote and signed a testamentary writing in these words:—“Codicil to my will. Denne Hill, 12th October, 1829. Until my will is clearly made out, I hereby make this codicil respecting the charge and care of my children. That my wife Mary Lady Mon-

Jan. 28th.
 Feb. 11th.
 Testator divided his will into several clauses or articles, which he numbered; and after appointing several trustees, and providing for their succession, he, by the second article of

his will, bequeathed to his trustees, in trust for the use of his wife and children as thereafter detailed; viz. all his household furniture, plate, medals, china, linen, books, paintings, prints, wines, provisions, horses, carriages, cows and sheep, and all other live and dead stock in and about his premises, with all his ready money in his house and at his agents and bankers, with all monies due to him at the time of his decease: also, he gave and devised all and every his dwelling-house and mansion, buildings, gardens, and lands, with the appurtenances, and all his real estates, upon trust as aforesaid, and upon the uses thereafter stated, that is to say, all his real estate in and about Denne Hill, &c., until the youngest of his surviving children attained the age of twenty-five years: at that period he willed that his eldest surviving child should be put into possession of all his freehold and leasehold property, including all timber and underwood, and *all personal property on the estates*. By a subsequent article, he appointed his eldest son or next surviving child in seniority his residuary legatee. There were other clauses in the will, and also a testamentary writing, from which it appeared to have been a principal object of the testator to give his children the advantage of having the same home for a period after his death as they had enjoyed in his lifetime:—*Held*, upon these clauses taken together, that the enjoyment and rents of the testator’s real estates devised by the will belonged to the testator’s wife and children generally, (subject or not subject to a discretionary power of regulation in the trustees) until the attainment by the youngest surviving child of the age of twenty-five. *Held*, also, that the property described as *all the testator’s ready money in his house, &c.*, did not belong to the residuary legatee, and did not fall within the description of *all personal property on the estates, &c.*, but was to be applied for the benefit of the wife and children.

Testator bequeathed to trustees, for the use of his wife and children, the interest of his property in the English and French funds; and he gave the capital to his surviving children, that is to say, to be equally divided at the period of his eldest surviving child attaining the age of thirty. By a codicil, he bequeathed to his executors, for the use of his children, “whatever sum now stands in my name, or may hereafter, in the Dutch funds, or any other funds, including the interest arising therefrom:”—*Held*, that the words “any other funds” included stock in the British funds.”

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tresor, the Rev. Edward Cage, and Sir Edward Knatchbull be guardians to my children, and that their home be that of Denne Hill, under the immediate control and direction (of details) of my said wife Mary Montresor, until they respectively attain the age of twelve years, at which age the authority and advice of the other two guardians will be required to assist the judgment of my wife, to whom she will naturally apply intermediately for their advice and assistance, as to putting my children to school, or other matters relating to their welfare. The guardians will please to make pecuniary arrangements to make Denne Hill the rendezvous of my children until they are put out in the world, and acceptable to them even after that. Henry T. Montresor, Denne Hill, 8th October, 1829. I omitted naming my brother as guardian, he having so many children of his own, but, on reflection, I am sure he will give his assistance and able advice. I hereby appoint him also a guardian to the dear orphans.

“HENRY T. MONTRESOR.”

The testator afterwards made his will in his own handwriting, dated the 22nd December, 1829, in the following terms:—“1st, I constitute and appoint my brother Lieutenant-General Thomas G. Montresor, my wife Mary Montresor, the Rev. Edward Cage, rector of Eastling, Sir Edward Knatchbull, Bart., M. P. and my nephew Thomas Montresor, executors and trustees of this my will, with power of the two last surviving to appoint two additional trustees, unless any of my children may have attained the age of twenty-one years, when I will that they, in succession, if attaining that aforesaid age, become additional trustees and executors of this my will. 2ndly, I bequeath to my trustees, as aforesaid, for the use of my wife and children, viz. Henry Edward Montresor, Charles Francis Montresor, Edward John Thomas Montresor, and Annetta Montresor, as hereafter detailed, viz. all my household fur-

niture, plate, medals, china, linen, books, paintings, prints, wines, provisions, houses, carriages, cows and sheep, and all other live and dead stock in and about my premises, with all my ready money in my house, and at my agents and bankers, with all monies due to me at the time of my decease: also I give and devise all and every my dwelling-house and mansion, buildings, gardens, and lands, with the appurtenances, and all my real estates, upon trust as aforesaid, and upon the uses hereafter stated, that is to say; all my real estate in and about Denne Hill, &c., and also my leasehold property of Woolwich Wood, in the parish of Womanswold, until the youngest of my surviving children attain the age of twenty-five years: at that period of time I will that my eldest surviving child be put into possession of all my freehold and leasehold property, including all timber and underwood, and all personal property on the estates. 3rdly, I devise to my trustees, for the use of my wife Mary Montresor and my children, (at the discretion of my said trustees), the interest of my property in the English and French funds or stocks; and the aforesaid funded property I bequeath to my surviving children, (share and share alike), that is to say, that it be equally divided at the period of my eldest surviving child attaining the age of thirty years, and this personal property to be made over to them at that period of time by my executors and trustees. 4thly, I likewise devise to my trustees, for the use of my children, such monies that have been left to me in reversion by the late Lieutenant-General Sir Samuel Auchmuty, G. C. H. after the demise of his sister, also the money standing in the American funds in my name, and also the money accruing after my decease from the clothing of my regiment, as also the sum, about £6000 £3 *per Cent.* Reduced, I settled upon my wife Mary Montresor, after her demise. It is my will that the above sums stated in and expressed in this article, No. 4, with the accruing interest from a sinking fund, be equally divided among

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my surviving children (or such balance as may remain after what may have been deemed necessary to advance their several situations in the world, at the discretion of my said trustees) at the period when my eldest child attains the age of thirty years. 5thly, I bequeath to my trustees, for the use of my wife and children, my fifty shares in the Canterbury and Whitstable Railway Company, (be there more or less shares), to be equally divided among the survivors when the eldest child attain the age of thirty years. 6thly, In the event of all my children dying without lawful issue, I bequeath the use of all my landed and personal property to my dear wife Mary Montresor during her natural life, that is to say, the use of the landed property and the interest of the funded property; and after her decease, and provided my children all die without lawful issue, I will that all my property, whether personal or real, devolve to my nephew Thomas Montresor, in the profession of the law; and in default of his having lawful issue male, to my nephew Frederick Byng Montresor; and in succession as aforesaid to my nephew Henry Montresor, and the like to my nephew John Montresor and his heirs. 7thly, should my wife (Mary) marry again after my decease, (during the life of any of my children), from that I will that she forfeit all claim on my property, and I hereby cancel any such claim accordingly, but not annul the power and authority of a trustee. 8thly, I hereby appoint my eldest son Henry Edward Montresor, or next surviving child in seniority, my residuary legatee. 9thly, I hereby empower my trustees to make such annual and suitable allowance from my income from time to time to my wife, for the maintenance of herself and my children, to keep up, preserve, and support and preserve the estate; and I further empower my trustees to sell out my money in American stocks, if necessary, and vest it in the sinking fund explained in No. 4 of this my will, and also to make entries and bring actions as the case may require. In witness whereof I have hereunto set

my hand and seal, the day and year first above written, viz. the 22nd day of December, 1829. 10thly, In further explanation, my funded property is in the *£3 per Cent.* Consols, the *£3 per Cent.* Reduced, and the *3l. 10s. per Cent.* British, and the *£5 per Cent.* French Rentes.

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“ HENRY T. MONTRESOR.”

“ Codicil No. 1. This 23rd (twenty-third) October, 1831. I bequeath 38 A. 3 R. 14 P. of freehold land, in the parish of Ash-next-Sandwich, near Richborough Castle, purchased of the Cumberlege family, now in the occupation of George Solley and Thomas Solley, to my executors, in trust for my children, under the same regulations and restrictions as though it had been specified with my other landed property in article No. 2 of this my will. Signed at Denne Hill.

“ HENRY T. MONTRESOR.”

“ Codicil No. 2. I bequeath Dungate Wood, in the parish of Lyminge, in the county of Kent, lately purchased of the Cumberlege family, estimated at 25 A. 1 R. 23 P., to my executors, in trust for my children, under the said regulations and restrictions as specified in article No. 2 of my will. Having purchased additional shares in the Canterbury and Whitstable Railway, now amounting to eighty, I hereby confirm article No. 5 of this my will, as to the further equal distribution of such eighty shares.

“ Denne Hill, 25th February, 1832.

“ HENRY T. MONTRESOR.”

“ Codicil No. 3. I hereby bequeath to my executors, to hold for the use of my four children, (share and share alike), whatever sum now stands in my name, or may hereafter, (be they more or less), in the Dutch funds, or any other funds, including the interest arising therefrom.

“ No. 4. I hereby request that my trustees, or rather executors, transfer from what stands in my name in the

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£3 per Cent. Reduced the sum of 1126*l.* 5*s.* 4*d.* stock to the trustees of my marriage settlement, in the same manner and as addition to the sum therein mentioned, viz. 5873*l.* 14*s.* 3*d.* stock, making together £7000 *£3 per Cent.* Reduced Stock, the sum total to be ultimately distributed in the same manner as directed by this my will No. 4, in regard to the original settlement, the trustees of which are Thomas Montresor and William C. Fairman, Esq.

“ Denne Hill, 14th of July, 1835.

“ HENRY T. MONTRESOR.”

The testator died in March, 1837, leaving the four children named in his will, (then infants), and no other issue, and also his wife and the several other persons named in the will, surviving him.

The bill was filed by the executors against the testator's widow and children and his nephews, for the purpose of obtaining the directions of the Court as to the execution of the trusts.

The cause came on for hearing before his Lordship the *Master of the Rolls* in August, 1837, and afterwards upon hearing for further directions before the same learned Judge, in June, 1840. On the latter occasion it was declared, that the will and the two codicils of the 23rd October, 1831, and the 25th February, 1832, were well proved, and that the trusts of the same and of the other codicils ought to be carried into execution, and it was decreed accordingly. And it was (amongst other things) further declared, that the power given to the trustees, in the ninth clause or article of the testator's will, for providing an allowance for the maintenance of the widow and family of the testator, and for the preservation and keeping up of his estate, extended over the whole of the real and personal property of the testator which passed by the will and codicils, and that such real and personal property was liable to contribute rateably, and in proportion to

the respective values thereof, to the trusts for the preservation and keeping up the estate in the said ninth clause or article mentioned; and also, that the direction contained in the said ninth clause or article for the preservation of the testator's estate was to be considered (having regard to the trusts in the second clause or article of the testator's will) as a legacy of so much income as might be necessary to keep up and preserve the said residence at Denne Hill aforesaid, with its appurtenances, in the same condition as the same were in at the death of the said testator, or as near thereto as circumstances would allow.

The cause now came on again for hearing for further directions.

Mr. *Russell* and Mr. *G. L. Russell*, for the plaintiffs.

Mr. *F. Bayley*, for the defendant Lady Montresor.

Mr. *Tennant*, for the nephews.

Mr. *Wigram* and Mr. *Stevens*, for Henry Edward Montresor, the eldest son.

Mr. *Simpkinson*, for the younger children.

The VICE-CHANCELLOR was of opinion that the gift to the nephews, being limited after an indefinite failure of issue of the children, was void for remoteness. And his Honor directed that the bill should be dismissed, as against all of them except Thomas Montresor (who was a trustee), and without costs.

The other questions that were argued will sufficiently appear from his Honor's judgment, which he declared on a subsequent day.

The VICE-CHANCELLOR.—The will and codicils of Lieu-

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tenant-General Sir Henry Montresor, the testator in this cause, which I have found myself under the necessity of reading many times, appear to be wholly in his handwriting. They are untechnically, informally, and not clearly worded, and were probably made without professional advice or assistance. But it is, I think, to be collected from them that one principal design on his part was to prevent, if he could, the dispersion of his family, and to continue, if possible, that which was their home in his lifetime as their home after his death, until the youngest of his surviving children should have reached the age of twenty-five; to have his establishment in the main, as conducted in his lifetime, supported accordingly until that period, and for this object to make such provision as should be sufficient. That he placed, or without professional assistance was probably able to place, a complete and comprehensive scheme for these purposes upon paper,—that he thought, or, unassisted, was likely to think, of the various details and contingencies, the consideration of which was requisite for the proper and convenient execution of such a plan, I do not say; but that it was in his mind, generally, is to me evident. It cannot be matter of surprise if its execution by himself is found defective and technically inaccurate.

The first, second, and ninth clauses of the will are thus: [His Honor read the clauses].

And the first question for the decision of the Court is, whether the enjoyment and rents of the testator's real estates, devised by this instrument, belong under it to the wife and children generally (subject or not subject to a discretionary power of regulation resting in the trustees) until the attainment by the youngest surviving child of the age of twenty-five. My opinion is, that they do: that such is the intention to be fairly and reasonably collected from the language of the three clauses that I have read, whether taken or not taken in conjunction with the rest of the will,

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and whether the first and second codicils are or are not material upon the question, and without laying any stress on such degree of probability, as at the date of the will and during the residue of the testator's life there was, that his heir at common law or one of his heirs in gavelkind would be the person entitled under the will to succeed to the possession of his real estates upon the attainment by his youngest surviving child of the age of twenty-five.

I have said that I think it not necessary to place any reliance on the first and second codicils, for the purpose that I have been mentioning. But can his meaning in this respect be seriously doubted when we find these codicils, though they do not mention Lady Montresor, worded thus? [His Honor here read those codicils.]

The difficulty, however, of the next question of which the Court has to dispose is greater. This is, whether, in those portions of the testator's property which he describes as "all my ready money in my house, and at my agents and bankers, with all monies due to me at the time of my decease," the residuary legatee, who appears to me to be absolutely, and not contingently, the eldest son, Mr. Henry Edward Montresor, has as residuary legatee any present or future interest.

For the purpose of answering this question, it is, I think, necessary or right to consider how these parts of the property would have been held if the will had stopped at the end of the passage just mentioned, that is, with the words "due to me at the time of my decease." If it had, I am of opinion that the wife and children would certainly have taken the absolute beneficial interest in these subjects. Supposing this to be so, the property and interest must so remain unless taken away or affected by some subsequent clause or provision exhibiting with equal certainty an intention to take it away or affect it. An absolute gift plainly made in the former part of a set of testamentary provisions ought of course to stand, unless by a latter part

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if there is a plain intention to revoke it or modify it in an unintelligent manner is certainly shown. Is that done here? After much consideration of the case, I have come to the conclusion that it is not.

It has been contended, on the part of the residuary legatee, that the words "until the youngest of my surviving children attain the age of twenty-five years" have reference to the sums and debts in question, and are directly connected with that gift. This may or may not be so. But if it is so, there does not, I think, of necessity follow the consequence that the wife and children are excluded from any right to have the capital or any part of it applied for their use—that they can take no benefit from these sums and debts except the income arising from an investment of them until the time mentioned. Upon that assumption it may be, and either upon that or a contrary assumption I think it is, the true construction of the will, having regard as well to the fourth, sixth, and seventh clauses as to the rest, that this money was to be applied as income for the benefit of the wife and the children, or was to be or might be, wholly or to any extent, either at their discretion or at the discretion of the wife or of the trustees, expended for the use of the wife and children. What, if any, would be the effect of her marriage, if she should marry before the expenditure of the whole, as to what may be then unexpended, it is not at present necessary to consider.

Perhaps the cases of *Malim v. Keighley* (a), *Pushman v. Fulliter* (b), and *Ross v. Ross* (c) may be thought not without some bearing on the construction of this will, at least in one possible view of it. I repeat, that, in any view, the residuary legatee, as such, is, in my judgment, absolutely excluded from these sums and debts, and that not any part

(a) 2 Ves. jun. 333, 529.

(b) 3 Ves. 7.

(c) 1 J. & W. 154.

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of them (not even the ready money in the house) is included under the words "all personal property on the estates," according to what I think a just interpretation of the will. With regard to the wines and provisions expressly bequeathed, those and the produce, after the testator's death, of his live stock given by it, must be considered as belonging to the wife and children absolutely.

Then comes the question as to the third codicil. Considering the language which the testator has used in several parts of his testamentary dispositions, (I mean particularly the words "funded property," occurring in the 10th clause and other parts of the will, the words "American funds" in the will, and the words "Dutch funds or any other funds" in the third codicil), I feel myself obliged to say that the words "or any other funds" in the third codicil must be held to have a larger meaning than that attributed to them by Lady Montresor's counsel, and must include stock in the British funds. Any other interpretation of this codicil would, in my opinion, be too speculative and conjectural to be justifiable.

These, I think, are the only points in this case on which the judgment of the Court was desired.

DECLARE, that, according to the true construction of the will and first and second codicils of the testator, the rents and profits of the real and leasehold estates thereby devised and bequeathed accruing due after the death of the testator, and so long as any child of the testator shall be living under the age of twenty-five years, or until the marriage (if any) of the defendant Dame Mary Montresor, or until further order, are well given to the trustees named in the will, for the use of the testator's wife and children. And declare, that, according to the true construction of the said will, the defendants Dame Mary Montresor and Henry Edward Montresor, and the infant defendants Charles Francis Montresor, Edward John Thomas Montresor, and Annetta Frances Montresor, are entitled to the use and enjoyment, so long as any child of the testator shall be living under the age of twenty-five years, or until the marriage (if any) of the defendant Dame Mary Montresor, or until further order, of the testator's household furniture, plate, medals, china, linen, books, paintings, prints, and carriages, and live and dead stock in and about his residence at Denne Hill at the time of his death, except the wines, provisions, and other

The
 Defendant
 Henry Edward Montresor

articles of which the use is the consumption; and that, subject thereto, the said immovable furniture, plate, medals, china, linen, books, paintings, prints, and drawings, and live and dead stock, except as aforesaid, are comprised under the expression in the second clause or article of the said will contained in "all personal property on the estates." And declare, that, according to the true construction of the said will, the said testator's widow and children are absolutely entitled to the wines and provisions and other articles of which the use is the consumption, and to the produce after the death of the said testator of all the live stock in the second clause or article of the same will mentioned, and to the interest of the monies produced by the sale of such parts of the live and dead stock, except as aforesaid, as have been sold. And it appearing that the live and dead stock, as so aforesaid, have been sold and have produced the sum of £1800, as the interest and dividends which have arisen and which, so long as any child of the said testator shall be living under the age of twenty-five years, or until the marriage of the said defendant Dame Mary Montresor, or until the further order of this Court shall arise, from the said sum of £1800, be paid to the said defendant Dame Mary Montresor, for the use of herself and the said testator's children. And declare, that, according to the true construction of the said will, the defendant Henry Edward Montresor is the testator's residuary legatee. But declare, that the ready money in the said testator's house, and at his agents and bankers, and the monies due to him at the time of his death are by the said will given to the said testator's wife and children absolutely. And declare, that, according to the true construction of the said will and codicils, all the sums standing in the said testator's name at the time of his death in the Kingdom of France, and Dutch India, but not including the 1126*l.* 5*s.* 4*d.* stock in the Dutch India mentioned, and thereby directed to be transferred to the trustees of his marriage settlement, are given to the said testator's executors, for the use of his four children as tenants in common, and that the said four children are absolutely entitled thereto. And, inasmuch as his Lordship the Master of the Rolls did, by the order of the Sir John Mordaunt, 1841, declare, &c., contain the said declarations.

* * * * * This order is to be without prejudice to any question which may arise upon the effect of any future marriage of the defendant Dame Mary Montresor. Done in the hall at against the defendants Frederick Jervis Montresor, Henry William Montresor, and John Montresor, &c.

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SMITH v. HURST.

March 13th.

IN November, 1844, the plaintiffs commenced an action against the defendant Hurst; and on the 22nd January, 1845, obtained judgment, whereupon a writ of *fi. fa.* was issued. Upon the sheriff's officer, however, attempting to gain admission to the house of the defendant Hurst, he was resisted by the defendant Padwick, who claimed to be a creditor of Hurst, and was in possession of Hurst's property, both real and personal, under an alleged deed, which the defendants stated by their answers to bear date as of October, 1844, and to be a conveyance and assignment of the real and personal property of Hurst for the benefit of his creditors, but of which the plaintiffs had no other information.

Mr. *Wigram* and Mr. *R. Palmer*, for the plaintiffs, now moved for a receiver of the real and personal estate of Hurst; contending, that the deed, as stated, was invalid as against the plaintiffs: *Garrard v. Lord Lauderdale* (a), *Wallwyn v. Coutts* (b).

Mr. *Simpkinson* and Mr. *Evans*, for the defendant Padwick, contended, that, as to the real estate, the plaintiffs were at present precluded from proceeding in equity upon their judgment, by the terms of the 13th section of the 1 & 2 Vict. c. 110 (c).

Under the stat. 1 & 2 Vict. c. 110, s. 13, which, after enacting that a judgment shall operate as a charge on the debtor's lands, provides that no judgment-creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, the Court, upon a bill filed by a creditor to enforce his judgment under the statute, declined to appoint a receiver of the real estate of the debtor within the year limited by the statute.

A judgment-creditor who desires to enforce his security against his debtor's equitable interest in freehold estate by a bill in

equity not founded on the statute 1 & 2 Vict. c. 110, must previously sue out an *elegit*.

(a) 3 Sim. 1; 2 Russ. & My. 451.

(b) 3 Mer. 707; 3 Sim. 14.

(c) Whereby it is enacted, that a judgment to be hereafter entered up against any person in any of

her Majesty's superior courts at Westminster shall operate as a charge upon all lands, tenements, &c., of or to which such person shall, at the time of entering up such judgment, or at any time af-

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Mr. Sermon and Mr. Gode, for the defendant Hurst,
 referred to *Bristol v. Williams &c.*

Mr. Sermon requested for other parties.

Mr. T. G. in reply, referred to the 11th section of
 the act.

The VICE-CHANCELLOR.—As to the real estate, I am
 of opinion, that, under the law, independently of the act
 of Parliament, the Court cannot now interfere, no writ of
elegit having been issued; and, with regard to the act of
 Parliament, the judgment not being a year old, I am of
 opinion, that, under the 13th section, construing it as well
 as I can, I cannot appoint a receiver. Upon the question
 whether the Court could proceed by way of injunction to
 prevent the alienation of the real estate, or the cutting
 down timber, I avoid giving any opinion.

As to the chattels the case is different. The writ of
feri facies in the hands of the sheriff binds the property;
 and the deed is stated in such a manner, and with such
 circumstances, as to render it probable (I do not say cer-
 tain) that it is rather an instrument of agency within the
 meaning of the cases to which reference has been made,
 than a deed of trust.

I am of opinion, therefore, that the personal estate must
 be placed *in medio*, either by means of a receiver, or other-
 wise as may be thought most advisable for the protec-
 tion of the property.

terwards, be seised, possessed, or
 entitled for any estate or interest
 whatever at law or in equity, &c.:
 provided, that no judgment-cre-
 ditor shall be entitled to proceed

in equity to obtain the benefit of
 such charge until after the expira-
 tion of one year from the time of
 entering up such judgment.

(a) 3 Hare, 235.

MEMORANDA.

IN Hilary Vacation, 1845, the following gentlemen were appointed her Majesty's counsel; viz. *William Lee*, Esq., of the Inner Temple, *John Billingsley Parry*, Esq., of Lincoln's Inn, and *William Page Wood*, Esq., of Lincoln's Inn; and, at the same time, *James Manning*, Esq., Serjeant-at-law, received a patent of precedence.

Afterwards, in the same vacation, the following gentlemen were appointed her Majesty's counsel; viz. *Lebbeus Charles Humfrey*, Esq., of Lincoln's Inn, *Russell Gurney*, Esq., of the Inner Temple, *George Medd Butt*, Esq., of the Inner Temple, and *Abraham Hayward*, Esq., of the Inner Temple; and, at the same time, *William Fry Channel*, Esq., Serjeant-at-law, received a patent of precedence.

Afterwards, in the same vacation, *Montagu Chambers*, Esq., of Lincoln's Inn, was appointed one of her Majesty's counsel.



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1. Testator by his will gives the rents of his real property to his wife for life, and bequeaths the bulk of his personal property to her absolutely, constituting her sole executrix; and directs that certain trustees shall, as soon as conveniently may be after his decease, convert all the convertible residue of his personal estate into money, and invest it in Government or real securities, and pay the dividends to his wife for life. The ultimate trusts, both of the real and residuary per-

sonal property, are in favour of persons who are not *in esse* or not ascertained. Twenty years elapse, during which the trustees leave the widow in the possession and management of the whole property, and then the surviving trustee files a bill against her for an account. It appears in the suit that she has paid all the testator's debts, to an amount exceeding the amount of personalty not specifically bequeathed, but that she has left some of the assets outstanding, and claims to be a purchaser of those assets, in part satisfaction of the monies which she has overpaid:—*Held*, that, whatever might be her right at law as a purchaser of those assets upon a plea of *plenè administravit*, her right as a purchaser in equity is not absolute, but subject to the rules of equitable administration; and consequently, that, the bill being filed on reasonable grounds, the surviving trustee is entitled to the costs of the suit. But *held*, under the circumstances of the case, that he is not entitled to costs as between solicitor and client. *Hearn v. Wells*, 323

2. *Semble*, that a mortgage for years, of which a testator has been in possession for upwards of twenty years, without receiving interest, and without any claim being made in respect of the equity of redemption, ought, in

the administration of assets, to be considered as leasehold. *Hearn v. Wells*, 323

3. By the marriage settlement of W., an annuity of £800 Jamaica currency was settled on his wife for life, and was subsequently charged on an estate of W. in that island. W. afterwards made his will, whereby he charged his estates in a certain manner with the payment of his debts; and then, after reciting the settlement, and that he was desirous of making a larger provision for his wife, he gave her a rent-charge of £2000 *per annum* for life, which he charged on the R. estate, and which was to be in lieu of all dower and thirds. Upon the death of W., the widow released her title, if any, to dower, and elected to take the £2000 annuity, and payments were made to her on account of it by the executors. W., however, being at his death largely indebted to the firm of W. & Co., of which he was a partner, that debt was paid by his executors by means of a mortgage of the R. estate, and by the terms of the mortgage-deed the mortgagee was to hold the estate subject to the several annuities given by the will of W., but *freed and discharged of and from the debts and legacies charged upon the premises by the will, and of and from all other charges and incumbrances whatsoever*. The assets of W. turned out to be insufficient for payment of all his debts:—*Held*, that a portion of the payments made by the executors to the widow must be ascribed to the annuity of £800 Jamaica currency, and were to that extent good, but that the residue of such payments were not good against the creditors of W. *Held*, also, there being certain arrears of the annuity of £2000, and a fund in court arising from the produce of the R. estate, that, as to that part of the fund which was not applicable to the portion of the annuity representing the annuity of £800 cur-

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rency, the creditors of W. had priority over the mortgagee, as well as over the executors of the widow. *Lyon v. Colville*, 449

4. The owner in fee of two freehold estates, largely indebted by specialty and simple contract, devises one to A. B., in fee, charged with the payment of one-fifth, but only one-fifth, of all his debts, and devises the other to C. D. in fee charged with the payment of the other four-fifths, but no further part of those debts. These devises are not within the proviso of the Statute of Fraudulent Devises. *Ibid.*

5. The compensation fund for slaves in Jamaica is legal assets for the payment of creditors. *Ibid.*

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A person invested certain monies in a savings-bank and in a private bank, in the name of his wife's nephew:—*Held*, under the circumstances of the case, that the monies were intended for the advancement of the nephew; and upon the death of the nephew intestate during his minority, the monies so invested were decreed to be paid to his administrator. *Currant v. Jago*, 261

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AGREEMENT.

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1. An agreement between two persons, who are desirous of purchasing an estate advertised for sale by auction, that one of them shall not bid against the other, is not illegal. *Galton v. Emuss*, 243

2. A. and B. agree, that, in considera-

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tion of A.'s withdrawing his opposition to B.'s purchase of an estate at a sale by auction, A. shall have the right of pre-emption of that estate and of another estate belonging to B. during B.'s lifetime, and for twelve months after his decease. The agreement is founded upon valuable consideration, and can be enforced against the devisees in trust and *cestui que* trusts under the will of B. *Galton v. Emuss*, 243

3. Specific performance decreed of a parol agreement (in part performed) for surrendering a lease, and granting a new lease at a reduced rent. *Parker v. Smith*, 608

4. *Quære*, whether the words "approved by me, J. S.," affixed to certain memoranda by way of approval of an arrangement in which the party is interested, is a signing within the Statute of Frauds. *Ibid.*

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1. It is not necessary that the answer of a foreigner should be in his own language. *St. Katherine's Dock Company v. Mantzgu*, 94

2. A plaintiff cannot except for insufficiency to the answer of a defendant of unsound mind against whom a commission of lunacy has not been issued, answering by his guardian. *Micklethwaite v. Atkinson*, 173

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An arbitrator appointed by certain acts of Parliament made an award, which was resisted by one of the parties interested, as being, and was, in fact, without any fraud in the arbitrator, invalid:—*Held*, that this circumstance did not affect the validity of a subsequent award made in the same matter between the same parties. *Great North of England Railway Company v. Clarence Railway Company*, 507

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1. Assignees of a bankrupt plaintiff (who had become bankrupt after decree) were put to their election to proceed in the suit in the name of the plaintiff; and in default of their so electing, the proceedings were ordered to be stayed until further order. *Whitmore v. Oxborrow*, 91

2. The provision in the stat. 6, Geo. 4, c. 16, against the abatement of the suit by the death or removal of

assignees extended to the case of official assignees. *Lloyd v. Waring*, 536

3. Defendant assignee of bankrupt *held*, under the circumstances of the case, not entitled to receive his costs, though not liable to pay costs. *Edwards v. Jones*, 247

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CHARITY.

1. Testator, by his will, after disposing of one-half of the income of his personal estate, gave the following direction as to part of the remaining half:—"The sum of £50 sterling, more or less, shall be annually distributed, in a weekly allowance of bread, amongst twelve poor old persons residing in the parish of D., with some occasional donations to them and to others." By a codicil he directed that *at least* two sixpenny loaves should be given every week to sixteen old persons, and that, on the annual return of his birthday, each of these sixteen persons should receive a shilling loaf, &c., at the mausoleum which was to be erected to his memory:—*Held*, that the clauses in the will and codicil must be taken together, and that the effect of them was to make perpetual provision for the weekly gift of two sixpenny loaves to each of sixteen poor old persons of the parish of D., and for the annual gift of the shilling loaf, &c. to each of the sixteen persons at the mausoleum, if it should be erected, or some other convenient place. *Thompson v. Thompson*, 392

2. Testator, by his will, directed,

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that a sum *not exceeding* £50 a year should be paid in quarterly payments to a literary man, preferably not more than forty years of age. By a codicil, he declared that his object was to give what little assistance he could to a worthy literary person who had not been very successful in his career, and, as far as possible, to enable him to assist in extending the knowledge of those doctrines in the various branches of literature to which the testator had turned his attention and pen:—*Held*, that, provided the literary works of the testator were consistent with religion and morality, this was a charity to which the law of England would give effect. *Thompson v. Thompson*, 392

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Conditions annexed to appointments made in pursuance of a power, though in themselves void, *held* not to invalidate the appointments. *Palsgrave v. Atkinson*, 190

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1. The costs of a defendant trustee, notwithstanding he was a solicitor, ordered to be taxed as between solicitor and client. *York v. Brown*, 260

2. Tenant for life of a manor in which lands are enfranchised under the provisions of the Manorial Rights Commutation Act, is entitled to his costs out of the fund arising from the enfranchisement. *Ex parte the Archbishop of Canterbury*, 154

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DEBTOR AND CREDITOR.

1. A cheque for £4700, drawn upon the Lutterworth Bank, was given to A., at Lutterworth, on the 20th April, after banking hours, in payment for an estate. A., who lived three miles from Lutterworth, immediately handed the cheque to B., to

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be placed to A.'s account at the Rugby Bank. Rugby is six miles from Lutterworth. On the arrival of the cheque the same day at Rugby, the Rugby Bank had closed; but the cheque was deposited with one of the partners of that bank for the night, and in the morning of the 21st April it was paid into the bank, and on the same day transmitted by post to the Lutterworth bankers, with directions to send the amount to London. The Lutterworth bankers received the cheque early on the 22nd. At half-past one o'clock on that day they stopped payment:—*Held*, that the deposit of the cheque with the Rugby bankers was a reasonable and probable course on the part of A.; consequently, that the presentment to the Lutterworth Bank was in time to prevent the cheque from becoming his cheque, and that the debt was still due to him. *Bond v. Warden*, 583

2. An unstamped cheque addressed to Messrs. C. & Co., bankers, Lutterworth, but not expressed to have been issued at or within the legal distance of Lutterworth, is void within the statutes which require that such a cheque shall have the place of issue specified in it. *Ibid.*

3. The obligor of several bonds, in which A., his solicitor, joined as surety, conveyed certain real property to A., upon trust to sell, and out of the proceeds of the sale to pay the bond creditors. The creditors did not execute, nor had any notice of the deed:—*Held*, that the deed was a mere deed of agency, and not binding in favour of the creditors, but that A. was entitled to retain the estates conveyed to him, until he should be discharged from his liability as surety under the bonds. *Wilding v. Richards*, 655

4. Deed of conveyance of land by a debtor to a person upon trust for effectually securing the re-payment

of certain specified sums due in respect of certain bonds mentioned in the deed — *Held*, under the circumstances of the case, to be binding on the debtor as between him and the creditors, although the creditors did not execute the deed. *Wilding v. Richards*, 661

5. Bankers take from a customer an equitable mortgage by deposit of title-deeds. The property comprised in the deeds is subject to a trust, of which the bankers have no notice, and the deposit is made in breach of that trust. The trust must prevail against the bankers' lien. *Manningford v. Toleman*, 670

6. Assignee of A., under a deed of assignment and trust, for the benefit of A.'s creditors, decreed, under the circumstances of the case, to pay the costs of a suit for an account brought against him by the assignee of A., under the Insolvent Debtors Act. *Collins v. Reece*, 675

7. A. executes a deed of assignment of his effects to a trustee for the benefit of all his creditors who shall sign or assent to the deed within three months after the date of it:—*Quære*, whether, in the view of a court of equity, a creditor who does not sign or assent to the deed until after the expiration of the three months can take any benefit under it. *Ibid.*

8. Under the stat. 1 & 2 *Vict.* c. 110, s. 13, which, after enacting that a judgment shall operate as a charge on the debtor's lands, provides that no judgment-creditor shall be entitled to *proceed in equity* to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, the Court, upon a bill filed by a creditor to enforce his judgment under the statute, declined to appoint a receiver of the real estate of the debtor within the year limited by the statute. *Smith v. Hurst*, 705

9. A judgment-creditor, who desires to enforce his security against his debtor's equitable interest in freehold estate by a bill in equity, not founded on the stat. 1 & 2 *Vict.* c. 110, must previously sue out an *elegit*. *Smith v. Hurst*, 705

DECREE.

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Decretal order for payment of interest to creditors generally cannot be varied by confining the payment of interest to particular creditors, without a re-hearing. *Fyler v. Fyler*, 93

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1. Devise of "all that *freehold* farm called the Wick Farm, containing 200 acres or thereabouts, occupied by W. E., as tenant to me, with the appurtenances," to uses applicable to freehold property only. At the date of the will, and of the death of the testator, W. E. held, under a lease from the testator, 202 acres of land, which were described in the lease as the Wick Farm. Of these, twelve acres were leasehold:—*Held*, that the twelve acres did not pass by the devise. *Hall v. Fisher*, 47

2. Devise of estates to A., upon condition that A. should release, in favour of her brother B., all A.'s interest in £1000 "charged upon certain estates, limited by the marriage settlement" of the father and mother of A. and B. The sum of £1000 was comprehended in the settlement, and A. took an interest in it, but it was

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not charged on any estates:—*Held*, nevertheless, that it was the sum referred to in the will. *Howard v. Conway*, 87

DISCOVERY.

Before answer to a bill of discovery, motion to expunge amendments made with a view to converting it into a bill for relief, allowed. *Parker v. Ford*, 506

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A sum of £3000 is paid to a person out of the Court of Chancery upon his undertaking to apply £2000 of it in the purchase of a suitable house for himself and wife, which he is to convey to the trustees of his marriage settlement upon certain trusts, and to apply the remaining £1000 in setting himself up in business. Upon the receipt of £3000 he pays the whole to his bankers. He afterwards draws out nearly the whole amount in various sums at various times. Amongst the drafts is one which he delivers in payment for the purchase of a house suitable for himself and wife. Having procured the house to be conveyed to himself in fee, he deposits the title-deeds with his bankers, as a security for advances, without notice to the bankers of the trusts of the settlement. In considering the conflicting claims of the bankers and the trustees of the settlement with respect to the house, it must be presumed that the purchase-money for the house was paid out of that portion of the £3000 which was properly applicable to that purpose. *Manningford v. Toleman*, 670

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WILL, 13, 21, 50.

1. The personal representative of A. has a right of retainer in respect of a sum due to him from A.'s estate, as personal representative of B. *Thompson v. Cooper*, 85

2. Executors held personally liable in respect of the loss to the testator's estate of a sum outstanding on personal security, although the security was that of the bond of the testator's solicitor, and the money had been invested in that security by the testator some years before his death, and by his will he directed that his trustees should get in his outstanding personal estate "as soon as conveniently might be" after his decease. *Bullock v. Wheatley*, 130

3. Executors of trustees decreed to pay the costs of a suit rendered necessary by their having refused to pay over the trust fund on reasonable evidence of a person's death: but, inasmuch as the trustees had been guilty of a breach of trust in relation of the fund, such costs were decreed to be paid out of the assets of the trustees, and not personally by the executors. *Lyse v. Kingdon*, 184

4. Testator bequeathed all his personal estate to his wife, with the exception of two leasehold houses, the rents of which he gave to her during her life, and after her death directed that they should be sold, and the produce divided between his four children; and he appointed his wife and another person his executrix and executor. Upon the death of the testator, the wife entered into possession of his personal property, includ-

ing the leasehold houses, and paid all the testator's debts:—*Held*, under the circumstances of the case, that she had assented to the legacy to the testator's children. *Trail v. Bull*, 352

5. It is not essential to the efficacy or validity of an assent to a bequest, that it should confer a legal interest, or affect the mere legal title to the subject of the bequest. *Ibid*.

6. Testator, after giving a general direction for payment of his debts, gave and bequeathed all his real and personal estate to his wife for life; and, after her decease, he directed all his real and personal estate to be sold, and the produce to be divided between the children of certain persons named in the will. And he directed that the purchaser or purchasers of any part of his real or personal estate should not be liable to see to the application of the purchase-money, and that the receipt or receipts of his executor, his heirs, executors, and administrators, should be a sufficient discharge or sufficient discharges to the purchasers: and he appointed his wife and A. B., his executrix and executor:—*Held*, 1st, that the executrix and executor, or one of them, had an implied power (in case the testator died indebted) to sell the real estate for payment of the debts; 2ndly, that the executrix and executor having entered into a contract for the sale of parts of the estate, and it being shewn that at the time of the contract there were unsatisfied debts of the testator, the contract was valid; 3rdly, that the purchaser was not bound to take the title without the concurrence of the heir-at-law. *Gosling v. Carter*, 644

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See WILL, 45.

Testator gave his estate called F. to his wife during his eldest son's

minority, for the support of herself and children, in such manner as, in her discretion, she should think proper; with an injunction that the dwelling-house and premises should be kept in tenantable repair during his said minority. And he authorized and empowered his said wife to raise £200 for each of his daughters, as they should respectively attain the age of twenty-one years, by way of mortgage or otherwise, on the security of his said F. estate; and he thereby charged and made chargeable his said estate for the repayment of the said sums of £200 to each of his said daughters as aforesaid, and also for the payment of *any sum or sums of money, on the security of his said estate*, at his death. The testator, at the date of his will, and at the time of his death, was seised of the F. estate, which had been mortgaged for a debt of his own, and of an unincumbered estate called H.:—*Held*, that the F. estate was the primary fund for the payment of the mortgage debt in exoneration of the personality and the H. estate. *Evans v. Cockeram*, 428

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1. Under a marriage settlement certain money and stock in the funds were vested in trustees upon trust, during the joint lives of the husband and wife, to pay the interest and dividends to such persons and for such purposes as the wife, notwithstanding the coverture, should, by any writing under her hand, except in any mode of anticipation, direct or appoint; or, in default of such direction or appointment, into her own hands for her own sole and separate use, independently of her husband; and so that her receipts, notwithstanding the coverture, or the receipts of the appointee, might be good discharges:—*Held*, that the effect of this instrument was to restrain the wife from anticipation, whether by an appointment under the power or by an assignment independent of the power. *Moore v. Moore*, 54

2. Effect of over-payment to a married woman by mistake under an order in Chancery. *Ibid*.

3. The separate fund of a married woman protected against costs, on the ground, that, under the instrument through which she derived title, she was restrained from anticipation. *Ibid*.

4. A married woman can waive her equitable right to a settlement out of a fund in court, to which she has been declared entitled, although the clear amount payable in respect of such fund has not been ascertained. *Packer v. Packer*, 92

5. A real estate may be devised to

a married woman in fee simple for her separate use, yet in such a manner as to disable her during the coverture from making any sale, mortgage, charge, or incumbrance to take effect against it during her life or during her coverture. Hence, where A. devised a real estate to his daughter B., a married woman, in fee, but with a declaration *that she should not sell, charge, mortgage, or encumber it*, followed by another declaration that she should take it for her own sole and separate use and benefit and disposal, and have the sole management thereof, independent of her husband and free from his debts, &c.—*Held*, that the prohibitory clause was not void, inasmuch as it must be taken in connexion as well with the succeeding as the preceding words; and therefore that a security by way of equitable mortgage, executed by the husband and wife to a party who had notice of the wife's title under the will, was void against the wife. *Baggett v. Meux*, 138

6. *Feme covert* is entitled under a will to an estate in fee simple, subject to an outstanding lease for thirty-one years from June, 1816, at a rent of £60 *per annum*, and subject to a clause in the will prohibiting her from mortgaging or encumbering the property during coverture. In June, 1840, the husband takes an assignment to himself of the lease of 1816, and the husband and wife execute a new lease to E., as a trustee for the husband, for the term of thirty-one years, at the same rent as before. In this lease no notice is taken of the wife's separate estate, and E. enters into no covenants. In 1841, the property lets at £90 *per annum*. The new lease is an incumbrance within the meaning of the prohibitory clause contained in the will. *Ibid*.

7. Husband assigns his wife's reversionary *chose in action* to a parti-

cular assignee for value. He survives the person upon whose life the reversion depends, but dies without actually reducing the property into possession. The assignment is void against the surviving wife. *Ashby v. Ashby*, 553

8. By a marriage settlement certain stock in the funds was settled upon the intended husband and wife for their joint lives and the life of the survivor, and then upon the children of the marriage, with a power to the trustees, with the consent of the wife, to advance part of the fund for the benefit of the children in her lifetime. There were four children of the marriage. The husband died. The wife married again. The second husband assigned the wife's life interest for value. After the assignment the trustees, with the consent of the wife, exercised the power of advancement in favour of the children of the first marriage:—*Held*, that the power was well executed as against the assignee of the second husband. *Whitmarsh v. Robertson*, 570

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Sale of infant's property carried into execution under special circumstances. *Garmstone v. Gaunt*, 577

INJUNCTION.

1. On a motion made on behalf of the minority for an injunction to restrain the majority of the members of a corporation from surrendering their charter, with a view to obtain a new charter for an object different from that for which the original charter was granted, the Court granted the injunction until the hearing. *Ward v. The Society of Attornies*, 370

2. The Court refused to entertain a special motion to dissolve the common injunction. *Bordinave v. Wadson*, 432

INJUNCTION.

3. Mandatory injunction (in effect) compelling a railway company to pull down walls which they had built, in order to prevent another railway company from crossing their line. *Great North of England, &c., Junction Railway Co. v. Clarence Railway Co.*, 507

4. A railway act gives power to the A. company to build a bridge across the line of the B. company, provided that the width between the abutments of the bridge is not less than twenty-six feet. At the point where the bridge is to be built, the land of the B. company is forty-seven feet wide. The A. company have no right, within the meaning of the act, to build the abutments of their bridge upon the land of the B. company; but, having purchased adjoining land for that purpose, they have a right at law to the temporary use of the land of the A. company for the purpose of their building; and *quære*, whether this Court, on motion for an injunction to restrain the obstruction of the works, has not jurisdiction to award and secure to them possession of such temporary easement? *Ibid.*

5. A. brought an action against B., the editor of a newspaper, for stating in his paper that the plaintiff was the author of a certain libellous article which had appeared in the paper. To this action B. pleaded, by way of justification, that the matter from which the article had been drawn up had been furnished by the plaintiff in letters written to him by the defendant. Upon the action coming on for trial, the defendant submitted to a verdict of 40s. in favour of the plaintiff. The defendant afterwards shewed some of the letters to third persons. Upon a motion before answer to dissolve an injunction which the plaintiff had obtained to restrain the publication and production of the letters, the Court refused the application; more especially as upon the motion for the in-

junction the plaintiff had produced an affidavit to the effect that the verdict was taken under an arrangement that the letters should be delivered up, which affidavit was not sufficiently contradicted on the motion to dissolve. *Palin v. Gathercole*, 565

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PARTIES, 9.

TRUST, 3.

Testator gave the dividends of £5000 stock to A. for life, and if A. should die, then to A.'s wife for life, she to lay it out for the good of A.'s children; but if she should marry again, she should have nothing more to do with the money, but the executors should have full power over it, and lay it out as they should think best for such of the children as should remain under age; "and when the youngest child becomes of the age of twenty-one years, then this said £5000 stock shall be sold and the money shall be then equally divided between such of the said children that shall be then living, equally, share and share alike. No one of the said children shall be allowed or shall ever sell or part with his or her share or interest in this said money until it shall be divided. If on proof of any one or more of them having done so, then his or her share will from that time become the property of the other children. This said stock to stand in the names of my executors." The testator died in 1831. A. died in 1836. A.'s wife died in 1843, without having married again. The youngest child of A. came of age in 1844. In 1841, J., who was one of the children of A., and who was afterwards living when the youngest came of age, having been arrested for debt, presented his petition and obtained his discharge under the stat. 1 & 2 Vict. c. 110, for the relief of insolvent

debtors:—*Held*, that this was a "parting with" J.'s contingent reversionary interest in the capital stock within the meaning of the expression contained in the will; and, further, that the restraint against alienation contained in the will was valid; consequently, that the interest so parted with devolved to the other children of A., who were living when the youngest attained twenty-one. *Churchill v. Marks*, 441

INTEREST.

See DECREE.

MORTGAGOR AND MORTGAGEE,
5, 6, 7.

Where a will contains an implied, but no specific, direction for conversion of the property, and by an innocent mistake it has been left upon the original security and the income enjoyed by the tenant for life in specie, the Court, upon the mistake being rectified, will, at its discretion, allow the tenant for life interest at the rate of £4 *per cent. per annum* upon the value of the property, as taken at the expiration of one year from the testator's death. *Sutherland v. Cooke*, 503

ISSUE.

The Court of Chancery will, by consent of the parties to a suit, allow a verdict on an issue to be made the subject of a proceeding in error. *Clayton v. Lord Nugent*, 362

JAMAICA.

See ADMINISTRATION, 5.

JUDGMENT-CREDITORS.

See PARTIES, 6, 7.

JURISDICTION.

Under the common decree in a suit by creditors against an administrator—*Held*, upon the authority of *Spicer v. James*, (2 Myl. & K. 387), that the Master had no jurisdiction to decide

and testamentary and intestate if necessary, the court as to which had been set up by the defendant in his answer, and had not been assigned to the plaintiff until after the death. *Thompson v. Cooper*, 51

LAPSE

See *WILL*, 1, 22, 23

LAPSE OF TIME

See *ADMINISTRATION*, 2

VENDOR AND PURCHASER, 1.

In 1822 an action was brought upon a promissory note, and the debtor was arrested. Some afterwards the debtor was declared a lunatic, and in 1825 he, by his committee, filed a bill to restrain the action. In July, 1825, an arrangement was made and carried into execution by an order in the suit in Chancery, whereby the action was stayed, and the creditor agreed to establish and did proceed to establish his debt under the lunacy. In 1843, however, and before the Master acting in the lunacy had made any report as to the creditor's claim, the lunatic died. The creditor then filed his bill against the lunatic's executors:—*Held*, upon demurrer, the Court having no judicial knowledge of the effect of the death of the lunatic upon the proceedings in the lunacy, that the claim of the plaintiff was not barred by lapse of time. *Rock v. Cooke*, 477

LEASE.

See *HUSBAND AND WIFE*, 6.

MORTGAGOR AND MORTGAGEE, 3.

WILL, 44.

LEGACY.

Legacies charged on real estate *held*, under the circumstances of the case, to be payable, notwithstanding the lapse of more than forty years from the testator's death to the filing of the bill, the statute 3 & 4 *Will.* 4,

MARRIAGE ACT.

c. 25, not being applicable. *Reverend v. Frisby*, 16

LEGACY DUTY.

See *WILL*, 29.

LIMITATIONS (STATUTE).

See *LAPSE OF TIME*.

LEGATIES.

LUNATIC.

See *ANSWER*, 2.

LAPSE OF TIME.

MAINTENANCE (TRUST).

See *TRUST*, 3.

WILL, 10.

MARRIAGE ACT.

1. Upon an information under the Marriage Act against A. and B., minors, to enforce a forfeiture in respect of a fraudulent procuration of marriage by B. with A., it was proved that A. and B., being minors, were married by license on a certain day at a certain place, B. being aware that A. was a minor, and that, on the same day and at the same place, an affidavit was made by a person represented to be B., to the effect that A. was of the age of twenty-one. The Court gave the relator liberty to exhibit an interrogatory for the purpose of identifying the defendant B. with the party who made the affidavit. *Attorney-General v. Severne*, 313

2. In order to sustain an information under the 23rd section of the Marriage Act, a false affidavit that a party is of full age is equivalent to a false affidavit that the necessary consent to a minor's marriage has been obtained. *Ibid.*

3. In order to sustain such an information, it is not necessary to shew that the minor, with whom the marriage was procured, was entitled at the time of the marriage to any property, either in possession, reversion, remainder, or expectancy. *Ibid.*

MARRIAGE SETTLEMENT.

MARRIAGE SETTLEMENT.

See ADMINISTRATION, 3.

HUSBAND AND WIFE.

WILL, 27.

1. C., before the marriage of his daughter, conveyed certain lands to the use of himself for life, with remainder to trustees for a term of 200 years, upon trust for securing a rent-charge of £100 *per annum* to the husband and wife for their joint lives and the life of the survivor; and from and after the expiration or sooner determination of that term, and in the meantime subject thereto and to the trusts thereof, to the use of other trustees for a term of 1500 years, with remainder to C. in fee. The trusts of the 1500 years' term were declared to be as follows:—That the trustees should, after the decease of C., (*but subject and without prejudice to the yearly rent-charge and the remedies for securing the same*), by mortgage or sale or other disposition of the settled estates, or out of the rents thereof, levy and raise £2600, in trust for all and every the child and children of the marriage, or such one or more of them, exclusive of the others, and in such shares, &c., *and with such annual or other sums of money for the maintenance of such children from and after the decease of C.*, as the parents should by deed appoint:—*Held*, that the 1500 years' term did not wait for its commencement until the death of the survivor of the husband and wife, but commenced at the death of C.; and therefore that it was competent to the parents, after the death of C., by deed executed in pursuance of their power, to direct an annual sum to be raised out of the estates for the maintenance of their children born and to be born. *Gough v. Andrews*, 59

2. By the marriage settlement of

MARRIAGE SETTLEMENT. 721

A. and B., a sum of £3300 was assigned to trustees upon trust for the husband and wife for their respective lives; and after the decease of the survivor of them, in case there should be any child or children of their bodies then living, to pay the said sum unto such child or children which should be then living, in such shares, &c. as the husband and wife should jointly appoint; and for want of such appointment, the same was to go and be equally divided among *such children*, if more than one, *as should not be inheritable to the real estate* of the husband, share and share alike, and to be paid to him, her, or them, at his, her, or their respective age or ages of twenty-one years or days of marriage, which should first happen; and in case there should be no such child or children living at the time of the death of the survivor of A. and B., or if such, and they should all happen to die before their respective ages of twenty-one years or days of marriage as aforesaid, then the said sum was to go to such person or persons as B. by deed or will should appoint. A. and B. died without executing the joint power of appointment, having had several children, some of whom survived them:—*Held*, that a son of the marriage who attained twenty-one, but died without having been married in the lifetime of one of his parents, acquired a vested interest in the fund, but that two children who died infants and without having been married in their parents' lifetime were excluded from the fund. *Mostyn v. Mostyn*, 161

3. Upon the construction of a post-nuptial marriage settlement—*Held*, that the covenants entered into by one party were binding upon him only, upon the condition of the other party being bound by certain other covenants in the instrument; and that, as the latter party was under no

obligation to execute the instrument, and refused to do so, the former party was not bound by the instrument in equity, although he had executed it, and although the covenants contained in it were for the benefit of an infant. *Woodcock v. Monckton*, 273

4. Upon the marriage of an Englishwoman with a citizen of the United States, who was temporarily resident in England, the fortune of the wife, consisting of stock in the British funds, was assigned to trustees, who were Englishmen and relatives of the wife, upon certain trusts for the husband and wife, and the issue of the marriage. By the settlement, power was given to the trustees, with the consent of the husband and wife, to invest the trust property, in the names of the trustees or trustee for the time being, in the public funds of Great Britain or America, or upon real securities in England, Wales, or America; and power was also given to the husband and wife, or the survivor, in case the existing trustees should be desirous of being discharged from the trusts, to appoint new trustees. After the marriage, the husband and wife lived for about five years in England, and then went to reside permanently in America, having previously to their departure appointed three Americans to act as trustees, in the room of the two original trustees, the trust property being at the same time transferred by the English trustees into the American funds in the names of the three American trustees:—*Held*, that this appointment of American trustees, though not expressly authorised by the settlement, was valid. *Meinertzhagen v. Davis*, 335

5. Upon the construction of the power for appointing new trustees and the clause for the indemnity of the trustees contained in a marriage settlement—*Held*, that the appoint-

ment of three new trustees in the room of the two original trustees of the settlement was valid. *Meinertzhagen v. Davis*, 335

6. By a marriage settlement, trusts of certain property in the English funds were declared in favour of the husband and wife and issue of the marriage. The trustees afterwards retired from the trust, having transferred the whole of the trust fund into the American funds, in the names of new trustees, who were Americans. Subsequently, upon an apprehension by the old trustees that this transfer amounted to a breach of trust, the husband deposited with them certain tobacco warrants, which, by a written agreement between the parties, the old trustees were to be at liberty to sell, for the purpose of recovering the trust fund, they, by the same instrument, in consideration of this security, agreeing to suspend proceedings in America for the recovery of the trust fund. In pursuance of this agreement the old trustees sold the tobacco warrants, and invested the produce in Exchequer bills; but it was afterwards decided by a court of equity in England, that, at the time of the execution of the agreement, no breach of trust had been committed, and that the old trustees had then no interest in the fund:—*Held*, that, as there was no consideration for the deposit or agreement, the old trustees had no right, as against the husband or his representatives, to retain the Exchequer bills for the benefit of the infant children of the marriage. *Ibid*.

MORTGAGOR AND MORTGAGEE.

See EQUITABLE MORTGAGE. PARTIES, 9.

1. Three mortgages on the estates of distinct mortgagors were vested in the same trustees by one deed, which was prepared in the Master's Office, in

a suit for executing the trust. Upon the application of one of the mortgagors for liberty to redeem, and to have his mortgage-deed delivered up to him—*Held*, that he was entitled to have the deed, on his executing to the trustees a covenant to produce it, and paying the costs of the application; and that the costs properly incurred in preparing and settling the covenant should be borne by the mortgagee's estate. *Capper v. Terrington*, 103

2. Where deeds relating to mortgaged property (the mortgage being absolute at law) come into the custody of a court of equity, by means and in the course of a reasonable and proper administration of the mortgagee's estate, the costs of removing them out of court, upon the mortgage being paid off, must be borne by the mortgagor. *Burden v. Oldaker*, 105

3. Mortgagee of leaseholds, held for a term of years, joined with the mortgagor in leasing part of the property to A. B. for the residue of the term, at a rent of £3 *per annum*, payable to the mortgagor, his executors, administrators, and assigns. The lease contained a clause reserving the right of re-entry, in case of non-payment of rent, to the mortgagor, his executors, administrators, or assigns. There was also a declaration, that nothing therein contained should be construed to defeat, impeach, or determine the estate of the mortgagee under the mortgage-deed, so far as the same affected the entirety of the premises. After the execution of the deed, the mortgagor became bankrupt:—*Held*, that A. B. was entitled to the benefit of this lease, exempt from the mortgage, but that the mortgagee, and not the assignee of the bankrupt mortgagor, was entitled to the rent of £3 *per annum*. *Edwards v. Jones*, 247

4. Circumstances under which a mortgagee in possession was exonerated from having the mortgage account taken with annual rests. *Horlock v. Smith*, 287

5. A sum which was in court at the time the mortgagee took possession *held*, under the circumstances, to go in discharge of the mortgagee's interest due at that time. *Ibid.*

6. Rent received by the receiver before the mortgagee took possession, but not paid to her till afterwards, assumed, under the circumstances of the case, (but not decided), to go in discharge of the interest due to the mortgagee at the time of taking possession. *Ibid.*

7. Rent which did not appear to have been received by the receiver before the mortgagee took possession *held*, under the circumstances of the case, not to go in discharge of the interest due to the mortgagee at the time of taking possession. *Ibid.*

8. First mortgagee, after the usual notice given him by the second mortgagee to redeem, files a bill of foreclosure. At the end of the term mentioned in the notice, the second mortgagee tenders the mortgage-money and costs to the first mortgagee, which the latter declines to accept:—*Held*, under all the circumstances of the case, that the first mortgagee was not entitled to the costs of the suit after the tender. *Smith v. Green*, 555

9. First mortgagee ought, without a judicial proceeding, to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor. *Ibid.*

MORTMAIN.

The shares in the London Gaslight and Coke Company are not

within the Statute of Mortmain.
Thompson v. Thompson, 381

NEXT OF KIN.

See WILL, 9, 13, 16, 27, 33, 50, 51.

NOTICE.

See HUSBAND AND WIFE, 6.

VENDOR AND PURCHASER.
4, 5, 8.

OBLITERATIONS.

See WILL, 47.

OPENING BIDDINGS.

Purchaser who had applied to open the biddings, and upon a re-sale was outbid, allowed, under the special circumstances of the case, interest on his deposit, as well as the costs of the re-sale and of his application to the Court. *Filder v. Bellingham*, 526

ORDERS.

See PRACTICE, 3, 5, 6, 7.

PARTIES.

1. Upon a bill filed for the purpose of obtaining a declaration of the rights of the appointees of a personal fund under a will executed in pursuance of a power of appointment — *Held*, that the party interested in default of appointment was a necessary party to the suit. *Grace v. Ter- rington*, 3

2. Bill by trustee against one of several *cestui que trusts*, to recover the trust securities. The other *cestui que trusts* are unnecessary parties. *Brid- get v. Hames*, 72

3. If a defendant cannot object to a party being made a co-defendant, he cannot object to his being made a co-plaintiff, if the interests of the several

co-plaintiffs are not conflicting. *Nel- thorpe v. Holgate*, 203

4. Under the will of her husband a woman had a general power of ap- pointment over a sum of £20,000 Con- sols, which was to be raised and invest- ed out of the husband's personal estate, and, in aid thereof, out of his realty. Upon the husband's death, a suit was instituted against the wife, as his ex- ecutrix, and against the devisees in trust of his real estate, (who had power to sign receipts), for the admi- nistration of his real and personal estate. Pending the suit the wife died, having by her will appointed to various persons the £20,000 Consols part only of which, by reason of the deficiency in the husband's personalty, had been appropriated and invested. Upon a bill filed against the wife's executors to revive the administration suit — *Held*, as to that part of the appointed fund which was invested and appropriated, that, supposing the object of the suit to be to make it contributory to the husband's assets, the appointees were necessary parties; but, as to the remainder of the fund, *held*, that they were not necessary parties. *Milbank v. Collier*, 237

5. Where appointees are numerous, they may be represented, as defend- ants to a suit, by some on behalf of the rest. *Ibid*.

6. Judgment-creditors, whose judg- ments have been entered up subse- quently to the plaintiff's security, must be made parties to a bill of fore- closure: it is not sufficient that they should be served with copies of the bill under the 23rd of the Orders of August, 1841. *Adams v. Paynter*, 530

7. *Semble*, however, that this rule may be relaxed in cases where the judgment-creditors are inconveniently numerous. *Ibid*.

8. Where a marriage settlement contained the usual power to appoint

new trustees, and one of the trustees relinquished his trust, and a memorandum to that effect was indorsed on the settlement, but no new trustee was appointed in his room, and after his retirement the remaining trustees lent out the trust money on mortgage:—*Held*, that the retired trustee was a necessary party to a bill of foreclosure of the mortgaged estate. *Adams v. Pagnier*, 533

9. Mortgagor upon his marriage settled the mortgaged estate upon his intended wife and the issue of the marriage, and afterwards became insolvent:—*Held*, that his assignee was not a necessary party to a bill to foreclose the estate. *Steele v. Maunder*, 535

PARTNER.

1. A. agrees to take B. into partnership with him for fourteen years, in consideration of a premium of £2500, one half of which is to be paid at the signing of the articles, and the other half at the time of the execution of a deed of partnership to be founded on the articles. The articles are signed, the first instalment of the premium is paid, and the parties enter into partnership. After the lapse of a few months, A., under considerable provocation from B., excludes B. from the partnership. The connexion is not renewed, the deed is not executed, nor is the second instalment paid, but there is a formal dissolution of the partnership on a certain day. A. afterwards becomes bankrupt:—*Held*, that, in the accounts to be taken between A.'s assignees and B., the latter is to be credited with the whole amount of premium, but to be debited with the unpaid instalment, and with an additional portion of premium, calculated with reference to the actual duration of the partnership. *Bury v. Allen*, 589

Held also, that B. is entitled (without prejudice to any question) to en-

ter a claim for the whole premium under the bankruptcy. *Bury v. Allen*, 589

2. One of two partners may have a demand against the other for compensation in the nature of unliquidated damages, and enforceable in equity only. *Ibid.*

PAUPER.

1. A defendant who defends as executor, and is in contempt, may be admitted to defend *in forma pauperis* for the purpose of clearing his contempt. *Oldfield v. Cobbett*, 169.

2. A plaintiff suing *in forma pauperis*, carrying on a considerable business, and having the possession of property greater in amount than £5, though not after payment of his just debts, dispaupered. *Perry v. Walker*, 229

3. The affidavit as to property, filed in support of an application to be allowed to sue *in forma pauperis*, ought to except nothing but the wearing apparel, and the matters in question in the cause. *Ibid.*

4. *Semble*, that a pauper plaintiff or defendant may be dispaupered for vexatious conduct in the suit. *Ibid.*

PAYMENT.

See DEBTOR AND CREDITOR, 1, 2.

PLEA.

1. Plaintiff, by his bill, shews that he has no interest. Defendant (the time for demurring having expired) pleads a general release by the plaintiff. The plea is good. *Stooke v. Vincent*, 527

2. Defendant pleading a release, offers to produce it: he is not bound to produce it on the mere argument of the validity of the plea. *Ibid.*

3. Where, to a bill filed by husband and wife, one of several defendants filed a plea which was allowed, the Court declined, in the absence of the other defendants, to allow the

plaintiffs to amend by making the husband a defendant, and giving a next friend to the wife. *Stooke v. Vincent*, 527

TOWEN

See HUSBAND AND WIFE, 1, 8.

MARRIAGE SETTLEMENT, 2.

General bequest of personalty, with a reference to all property over which the testator had a power of appointment, *held* to operate as an execution of a power. See 1 *Vict. c. 26, s. 27. Pidgely v. Pidgely*, 235

PRACTICE.

See COSTS.

DISCOVERY.

MORTGAGOR AND MORTGAGEE.

PARTIES.

PAUPER.

1. Two successive creditors' suits having been instituted against the same executrix, the latter suit was permitted to go on, notwithstanding a decree had been made in the former suit; the decree having been obtained without sufficient proof of the debt, and being also irregular in form. *Reid v. Territt*, 1

2. After a supplemental bill had been filed to carry on the accounts in a creditors' suit against the administratrix of an intestate, the administratrix married. Upon the husband appearing, and consenting to be bound by the decree, the usual supplemental decree was made, without requiring an answer from the husband, or altering the title of the cause. *Sapte v. Ward*, 24

3. Practice in relation to the service of a defendant with a copy of the bill. *Warren v. Postlethwaite*, 121

4. An affidavit is not receivable in evidence on further directions. *Baily v. Nicholson*, 196

5. After a lapse of several months since the service of the subpoena to appear and answer, the Court will not

RAILWAY ACT.

allow the plaintiff a strict order to enter an appearance for the defendant, but will either give him a qualified order for that purpose, or put him to serve notice on the defendant. *Morgan v. Morgan*, 228

6. Leave given to enter a memorandum of service of a copy of the bill upon a defendant who had put in a special appearance under the 27th Order of August, upon the ground that the appearance amounted to an admission of service of a true copy of the bill. *Maude v. Copeland*, 505

7. Form of an order to revive by the survivor of several co-plaintiffs. *Holcombe v. Trotter*, 654

PRESUMPTION.

See EVIDENCE.

PRIORITY OF INCUMBRANCES.

See ADMINISTRATION OF ASSETS, 3.

PRIORITY OF LEGATEES.

See WILL, 31.

RAILWAY ACT.

See INJUNCTION, 3, &c.

1. A railway company having, under their act of Parliament, power to contract with incapacitated persons for the purchase of lands, and a right, upon payment of the purchase-money into the Bank, to the fee simple of the purchased lands, contracted with an incapacitated person, who died before the purchase-money was paid:—*Held*, that the title of the company could not be completed without the assistance of a court of equity. *Midland Counties Railway Co. v. Owen*, 74

2. In the absence of special clauses for that purpose, the effect of a railway act is not to alter the course of devolution of property, without the consent of the owner; and therefore, if a company, by virtue of their act, contract with an incapacitated person

SURVIVORSHIP.

for the purchase of lands, the purchase-money is to be considered as real, and not as personal estate. *Midland Counties Railway Co. v. Oswin*, 80

RELEASE.

See PLEA.

REMOTENESS.

See WILL, 2, 3.

RESIDUE.

See WILL, 18, 20, 51, 54.

RESTRAINT OF ALIENATION.

See INSOLVENT.

REVOCATION.

See WILL, 21, 34, 47.

SETTLEMENT.

See MARRIAGE SETTLEMENT.

SLAVE.

See ADMINISTRATION, 5.

SPECIFIC PERFORMANCE.

See AGREEMENT.

STATUTES.

9 GEO. 2, c. 36, p. 381.

4 GEO. 4, c. 76, p. 313.

11 GEO. 4 & 1 WILL. 4, c. 40, p. 197.

3 & 4 WILL. 4, c. 27, p. 56.

1 VICT. c. 26, pp. 255, 416, 630.

1 & 2 VICT. c. 110, pp. 441, 705.

STATUTE OF FRAUDS.

See FRAUDS.

STATUTE OF FRAUDULENT DEVISES.

See ADMINISTRATION, 4.

STATUTE OF LIMITATIONS.

See LIMITATION.

SURVIVORSHIP.

See WILL, 9, 33, 48.

TRUST AND TRUSTEE. 727

TENANT FOR LIFE.

See COSTS, 2.

WILL, 44.

1. Upon the construction of a devise of real property—*Held*, that an equitable tenant for life was entitled to the personal enjoyment of the property, upon giving security for the due fulfilment of the objects of testator's will. *Baylies v. Baylies*, 537

2. In order to give effect to the claim of the tenant for life, the Court (in contravention of a previous letting by the trustees of the will to a person who had notice of the trusts) granted a receiver of the property, with a direction to let it to the tenant for life upon the terms of giving such security. *Ibid.*

TRUST AND TRUSTEE.

See CHARITY.

COSTS, 1.

DEBTOR AND CREDITOR, 3, &c.
EXECUTOR.

TENANT FOR LIFE, 2.

1. Trustees under a will decreed to pay interest at £5 *per cent. per annum* on balances mixed by them with their own monies, and used in their own business, although the will authorised them to invest the residue on "good private securities." *Westover v. Chapman*, 177

2. Trustees decreed to pay the costs of an unnecessary inquiry directed before the Master, as to the state of the testator's family. *Id.*, 181

3. Trust for the support, clothing, and maintenance of an adult—*Held* to be a trust for his benefit generally, and to devolve to his assignees under the Insolvent Act, notwithstanding a provision to the contrary in the will by which the trust was created. *Youngehusband v. Gisborne*, 401

titled to rely on the before-mentioned stipulation as a ground for rescinding the contract, but that the contract must be specifically performed, with compensation in respect of the life interest. *Nelthorpe v. Holgate*, 203

6. *Quære*, in what cases successive purchasers are properly made parties to a suit for specific performance. *Ibid.* And see *Cutts v. Thodey*, 223; *Spence v. Hogg*, 225; *Collett v. Hover*, 227.

7. Bill by a purchaser praying specific performance upon the terms of the vendor deducing a good title at her own expense, in the ordinary way, dismissed; the Court being of opinion, upon the construction of a series of letters, and upon the fact of the abstract of title having been delivered to the purchaser in the first instance, that the vendor entered into the negotiation only upon this footing, namely, that she should deliver an abstract of title, and verify it, so far as she had the means in her possession, at her own expense, but that the purchaser, if upon perusal of the abstract he were satisfied with the title, should be at the expense of completing its verification. *Thomas v. Blackman*, 301

8. Purchaser discharged from his agreement upon a doubt whether the land was not bound by a covenant of which he had not notice. *Bristow v. Wood*, 480

VESTING.

See WILL, 11, 14, 17.

WILL.

See CHARITY.

CONDITION.

DEVISE.

EXECUTOR.

HUSBAND AND WIFE.

INTEREST.

LEGACY.

MARRIAGE SETTLEMENT.

1. A testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees, or the survivor of them, his executors or administrators, to A. and B., to be equally divided between them, share and share alike, if then living; but if dead, to go and be equally divided to and amongst the respective next legal representatives of A. and B., share and share alike. A. and B. died in the lifetime of the testator's widow:—*Held*, that the next of kin of A. and B., according to the Statute of Distributions, living at the death of the testator's widow, were entitled to the fund *per stirpes*. *Booth v. Vicars*, 6

2. Testator devised and bequeathed to trustees a mixed fund of realty and personalty, upon trust from time to time to receive the rents, issues, and profits thereof, and therewith to pay certain legacies; and upon further trust to pay, to and for the use, education, and maintenance of each of the daughters of his nephews A. and B., whether born in his lifetime or afterwards, the yearly sum of £40 apiece, until they should respectively attain twenty-five, or be married with consent of their respective parents or surviving parent; and on their respectively attaining that age, or being respectively married with such consent as aforesaid, in trust to pay each of them the sum of £1500 for their respective use and benefit. A. and B. had daughters living at the death of the testator, and also after-born daughters:—*Held*, that the bequests of £1500, so far as they related to after-born daughters, were void for remoteness. But *quære*, whether these bequests were not valid with respect to the other daughters, and whether the annuities of £40 were not valid for all the daughters. *Boughton v. James*, 26

3. Testator, after devising a mixed fund of realty and personalty to trus-

tees, upon trust to pay various legacies and annuities, directed, that they should invest all and singular the surplus of the rents, issues, and profits at interest, in their names, upon Government security, and suffer the same to accumulate. And he declared that the trustees should stand seised of his said trust estate and the accumulations, upon trust, when and as soon as that *any son of either of his nephews A. and B.* should have attained the age of twenty-five, a valuation of his said trust estate should be made, and that the same should be then divided into as many equal lots *as there should be sons of his said nephews then living*; and that *each of his said nephews' sons*, when and as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children; and that thenceforth the said portion or share should be held by the trustees upon trust for *the person so selecting the same for his life*, and after his decease, upon trust, as to one equal moiety, for his eldest son, and his heirs, &c., and as to the other moiety, for the rest of his children, and their heirs, &c.; and if but one child, both moieties for such child; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving lawful issue them or him surviving, the share of the party so dying was to go to the others and other of them; and if all but one should die without leaving lawful issue, the trustees should stand seised and possessed of the trust estate in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid; but if all his the testator's said nephews should depart this life without leaving lawful issue them surviving, then upon trust for such person as should

at that time be the testator's heir. At the time of the testator's death A. and B. had several sons living, and B. had a son born after that period:—*Held*, upon the construction of the will, that the trust for accumulation was so created that it might by possibility endure beyond the legal period, and that it therefore failed. *Held*, also, that such failure did not accelerate the postponed life interests in the residue given to the grand-nephews, inasmuch as the life interests so given, as well as the subsequent limitations, were void for remoteness. *Boughton v. James*, 26

4. A devise of real estate for life is invalid unless it vest within the compass of lives in being at the testator's death, and twenty-one years after the death of the survivor of them. *Ibid.*

5. Before the Accumulation Act a testamentary trust or direction to accumulate, so worded as to be capable of lasting beyond the compass of lives in being at the testator's death, and twenty-one years after the death of the survivor of those lives, would have been illegal and void for the whole, and such a trust or direction is not less illegal or void since the Accumulation Act. *Ibid.*

6. A testator gave all his messuages, lands, tenements, and hereditaments, and all his personal estate to trustees, to hold to them, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust to receive the rents, issues, and profits thereof, and to retain thereout yearly £10 for their trouble in the execution of the will, and then to pay legacies and annuities, with a direction that certain charitable legacies should be paid out of his personal estate:—*Held*, that the whole of the property, both real and personal, was to be considered as one mass for the purpose of paying rateably the annuities and legacies, except the legacies

expressly made payable out of the personal estate. *Boughton v. James*, 27

7. A bequest of "money, goods, chattels, estates, and effects," held to pass real estate. *Midland Counties Railway Co. v. Oswin*, 74

8. Bequest of £1000 to A. S., and the children that may be lawfully begotten of her body. A. S., being unmarried at the death of the testatrix, takes the legacy absolutely. *Read v. Willis*, 86

9. Testator, by his will, directed his executors to place out upon Government security such a sum of money out of the interest thereof as would be sufficient to produce an annuity of £50, which he gave unto his daughter I., for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst such issue; but if she should die without issue, he gave the same unto and equally amongst *his surviving children and their legal personal representatives*, share and share alike. The testator had four children living at the date of his will and of his death, of whom the daughter I. was the survivor. She died without leaving issue:—*Held*, that the words "surviving children" meant children surviving the daughter I.; and that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently, that the fund, of which the testator's daughter was the tenant for life, fell into the testator's residuary estate. *Taylor v. Beverley*, 108

10. Testator bequeathed one-fifth of his residuary personal estate to trustees upon trust for all and every the children or child of his son J. B., born and to be born, and who, being a son or sons, should live to attain twenty-one, or being a daughter or daughters, should live to attain that

age or be married, to be equally divided between them, if more than one, share and share alike, as tenants in common; and he directed that the dividends, interest, and income of the share or expectant share of each such child should be paid to his said son J. B. during his life, and after his decease, then during the minority of each such child should be retained by his said trustees or trustee, and be applied by him or them, as the event should happen, in, for, or towards the maintenance, clothing, and advancement of each such child, in such proportion, manner, and form as his said son J. B., or, as the event might happen, his said trustee or trustees, should think fit. At the date of the will and of the testator's death, J. B. had three children, one of whom, a son, afterwards attained twenty-one, married, and lived separately from his father:—*Held*, first, that a trust was constituted in J. B. of the income, for the maintenance, clothing, and advancement of his children, which trust did not terminate upon all or any of his three children attaining majority in his lifetime; secondly, that J. B. was not entitled to apply the income arbitrarily, according to his own will and pleasure; thirdly, that he was entitled to apply the income of a child's prospective share towards that child's maintenance, clothing, and advancement, without reference to his ability to maintain and educate that child; and, fourthly, that the son who had attained his majority was not entitled to an immediate transfer of one-third of the fund, inasmuch as it did not appear that the testator intended to exclude after-born children, and at all events he did intend to authorize an unequal distribution from time to time of the income for the benefit of J. B.'s children. *Bateman v. Foster*, 118

11. Testatrix bequeathed £3000 to trustees upon trust to pay the interest

to B. for life; and at the decease of B., the testatrix willed that the said £3000 should be equally divided among such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one; but her will was that if B. should die without leaving issue, then the £3000 should be paid to C.:—*Held*, that the children of B. took vested interests in the £3000 at her death, and consequently that the share of one who died after B., under the age of twenty-one, devolved to her father as her administrator. *Bree v. Perfect*. 128

12. Upon the construction of a will—*Held*, that the effect of general words of charge at the commencement was not altered by subsequent words. *Jones v. Williams*. 156

13. Testator, by his will, which was not altered by the Statute of 1 Geo. 4 & 1 Will. 4, gave all his personal estate (not including house and premises excepted) unto his cousin and two sisters, by name, upon trust to convert the same into money, and apply the proceeds towards payment of his debts and funeral and testamentary expenses; and his wearing-apparel was to be given away to whom they might think fit. He then gave his freehold and leasehold premises to the same persons, upon trust to sell and divide the proceeds among certain persons, two of whom were the trustees; with a declaration, that, in order to facilitate such sale, the receipts of his said trustees should be sufficient discharges. He then, after appointing his said trustees to be his executors, declared that his said executors and trustees might retain to and reimburse themselves all their costs, charges, damages, and expenses occasioned by the due execution of the trusts thereby in them reposed:—*Held*, that the executors did not take beneficially the residue of the personal estate which remained

undisposed of after payment of the testator's debts, funeral and testamentary expenses. *Mullen v. Bormann*, 197

14. Testator bequeathed the interest of £1000 stock to his granddaughter for life, and gave the residue of his personal estate to his wife. He then, after giving certain benefits to his daughter and granddaughter out of his real estate, directed that in case both of them, his said daughter and granddaughter, should die without leaving children to attain twenty-one, the proceeds of the sale of the real estate, together with the said £1000 stock, should go to the persons who would have been entitled to his personal estate under the Statute of Distributions in case he had died intestate:—*Held*, that the right of the widow to the £1000 stock under the residuary clause was devested by the subsequent clause, although she was herself one of the persons who, by virtue of that clause, and in the event therein mentioned, was to share the £1000 stock; but *held* also, that, until the event happened on which the gift was devested, she was entitled to all the dividends. *Martin v. Glover*, 269

15. Construction of the word "other" contained in a residuary bequest of "all other the rest and residue" of the testator's personal estate. *Ibid.*

16. Bequest of £1000 stock in a certain event "to the person or persons who would, under the Statute of Distribution of Intestates' Effects, have been entitled to my personal estate in case I had not disposed of the same by will." The description of the legatees is not one of persons, but of interest, and therefore their shares will not be equal, but according to the statute. *Ibid.*

17. Bequest of £1000 to A. upon trust to lay the same out in Consols, and pay the interest and dividends



to B. for life; and immediately after her decease, upon trust that the said stock should be transferred to B.'s daughter C., in case she should then have attained her age of twenty-one years, for her absolute use and benefit; but in case the said C. should not have attained her age of twenty-one years at the decease of her said mother, then upon trust to pay and apply the said interest and dividends, as the same should become due and payable, for the maintenance and support of the said C. until she should attain such age of twenty-one years, and upon her attainment thereof, upon trust to transfer the said stock or fund to the said C. for her use and benefit. B. and C. survived the testator. Afterwards C. died in the lifetime of B. without having attained the age of twenty-one years:—*Held*, that C. took a vested interest in the £1000. *Hammond v. Maule*, 281

18. Upon the construction of a will—*Held*, that the residue of the testator's personal estate devolved to his cousins german living at his death, except that the issue of any cousin dying between the date of the will and the death took the prospective share of the parent. *Cort v. Winder*, 320

19. Upon the construction of the same will the share of a cousin dying without issue between the date of the will and the death of the testator was held not to have lapsed, but to have fallen into the bequeathed residue.

Ibid.

20. Upon the construction of a will—*Held*, that an absolute gift of the residue to the testator's widow was cut down by subsequent expressions to a life interest. *Held* also, that the children of the testator's two sons took interests in the residue *per stirpes*. *Flinn v. Jenkins*, 365

21. A legacy given to the testator's trustees and executors, *as a mark of*

his respect for them—*Held*, not revoked by a codicil appointing other trustees in their room, and giving a legacy of equal amount to the newly-appointed trustees and executors, in similar language. *Burgess v. Burgess*, 367

22. Testator, by his will, directed that the fourth part of the net annual income of his property (which was personal) should be paid in quarterly payments to the eldest son of E.; and that, on his decease, the quarterly payment of his annuity should be continued to his heir-at-law; and failing the latter by death, so on in like manner as long as there should be an heir:—*Held*, that this was an absolute gift of one-fourth of the property to the eldest son of E. *Thompson v. Thompson*, 388

23. Testator, by his will, directed the income of one-half of his personal estate to be paid in equal shares to the eldest sons of his sisters E. and M. At the date of the will, an eldest-born son of M. was living, but he afterwards died in the testator's lifetime, leaving a second-born son of M. surviving him. After his death, and with knowledge of it, the testator, by a codicil, directed the trustees of his will to divide a certain sum among all the children then living of his sisters E. and M., with the exception of the two provided for in his will:—*Held*, that the second-born son of M. took the share given by the will to her eldest son. *Ibid.*

24. Bequest of £40 a year for the best essays in statistics, &c., with reference to the testator's writings on the subject—*Held*, valid. *Id.*, 398

25. Testator, after directing the income of his estate to be divided into moieties, and disposing of one moiety and making various bequests out of the other, directed that the remainder of the latter half, if any, should be given in occasional sums to

deserving legacy men, or so most expensive connected with the management of the works, which is not sufficiently obvious as is pointed. The trustees of the will declined to act.—*Held*, that the gift failed. *Thompson v. Thompson*, 395.

26. Testator first gave all his property to trustees upon certain trusts, and, secondly, directed that the trustees, from the commencement of the fifth year from the date of his decease, should set apart annually £10 per cent. upon the gross income of his estate, to be invested as additional capital in some good and valid medium of profit or interest, in order that the new income derived from that might go to increase the benefits intended by the former. He then proceeded to dispose of the remaining income:—*Held*, that no partial intestacy was created by the direction as to the £10 per cent., but that the dispositions of the bulk of his property were to be treated as if it did not exist. *Ibid*.

27. By the marriage settlement of A. a sum of £5000 stock was settled upon himself and his intended wife for their joint lives and the life of the survivor, and then for the benefit of their children; and, if no children, in trust for the settlor, his executors, administrators, and assigns. After his marriage, A. made his will, and thereby gave his real estate to P., and his heirs, upon the same trusts, as near as could be, as were declared of the stock by the settlement; and after giving certain pecuniary legacies, he bequeathed all the rest of his monies and property of any kind to P., his executors, administrators, and assigns, upon trust and for the benefit of the objects of his settlement, as he might think best. A. died, leaving his widow, but no issue of the marriage. P. declined to take probate of the will:—*Held*,

that whether the course taken by P. had or had not the effect of depriving him of the discretionary power given to him by the will, he could not, in the events that had happened, exercise that power so as to affect the rights of the parties interested under the will and settlement; and that the effect of these instruments was to give a life interest to the widow in the real and residuary personal estate, impeachable of waste as to the real estate, with remainder as to the real estate to the testator's heirs, and as to the residuary personal estate to his next of kin. *Ford v. Barton*, 403.

28. A man settles personal estate upon himself and his wife for their lives, and then upon their children, and, in default of children, upon himself, his executors, administrators, and assigns, and afterwards directs real estates to be settled upon the same trusts, as near as can be, as affect the personalty. Upon the death of the settlor without children, the real estate, subject to the life interest of the widow, goes to his heirs. *Ibid*.

29. A direction that all the testator's legacies shall be paid clear, means that they shall be paid clear of legacy duty. *Ibid*.

30. Testator bequeathed to his servant C. a legacy of £6000. He afterwards gave to his servants who should have been living with him two years at the time of his death a year's wages:—*Held*, that C., who had been living with the testator two years at the time of his death, was entitled to a year's wages in addition to the £6000. *Ibid*.

31. Testator directed his trustees to stand possessed of the residue of his estate, upon trust, in the first place, to pay what might be due under his covenant to J. S., and then upon trust to set apart and invest a sufficient sum to satisfy certain annuities which he bequeathed by his will; and, in the

next place, after making such investment as aforesaid, upon trust to pay the several pecuniary legacies bequeathed by his will. The assets were insufficient to pay all the legacies and annuities in full:—*Held*, that the annuitants had no priority over the legatees in respect of payment. *Thwaites v. Foreman*, 409

32. *Semble*, that a legatee, who asks a decree for immediate payment of his legacy, ought to pray for it by his bill. *Ibid.*

33. Testator, by a will made since the stat. 1 Vict. c. 26, after directing payment of his debts and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O., and P. He then directed that his freehold house and his leaseholds (some of which were held for years, and others for years determinable on lives) should be kept in hand and let to the best advantage, and the produce be divided every half-year to the above-named L., M., N., O., and P., or their lawful heirs; and, in case of there being no heir, the share or shares to be divided in equal parts among the surviving legatees. The testator, at his death, left L. his heiress-at-law and sole next of kin. M., N., O., and P. were not related to L., but were related to and capable of inheriting from each other. M. died unmarried in the testator's lifetime:—*Held*, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of kin. Secondly, that M.'s share of the freehold property did not lapse, but went to the surviving devisees; the words "heir" and "lawful heirs" referring to heirs of the body, and "or" being

construed "and." Thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heirs" referring to an indefinite failure of issue, and the word "surviving" meaning "other." *Harris v. Davis*, 416

34. Testator, by a will made since the stat. 1 Vict. c. 26, bequeathed the residue of his personal estate and certain freehold and leasehold estates in equal shares to L., M., N., O., and P. In a subsequent part of his will he bequeathed to H. one-half of the legacy named to each of the other legatees, that is to say, one-half what his brother M. ought to receive. By a codicil the testator declared as follows:—"I revoke all that part written in my former will which leaves a legacy to H., written in my will on the 32nd and 33rd lines:"—*Held*, that, by force of this revocation, the will was to be read as if the gift to H. were not in it; consequently, that such revocation enured to the benefit of the other devisees and legatees. *Ibid.*

35. If a testator, possessed of a specific chattel or chattel real, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime without issue, does not enable B., though surviving the testator, to take under the will, but causes a lapse. *Ibid.*

36. Upon the construction of a will—*Held*, that a particular freehold estate of the testator was the primary fund for the payment of a mortgage debt which had been charged thereon by the testator in his lifetime, in exoneration of the personalty and other estates. *Evans v. Cockeram*, 428

37. Upon the construction of a will—*Held*, that it was the intention of the testator, in the event of his wife and any of his children living at his death surviving him, that there should, at some time or other, be an absolute

sale and conversion of his real estate for their benefit. *Held* also, the wife and one of the daughters having survived the testator, that the daughter did not take, by devise or descent from him, any real estate descendible to her heir-at-law. *Tily v. Smith*,

434

38. *Quære*, whether a gift to A. in fee, with a proviso that if A. alien in B.'s lifetime, the estate shall shift to B., is valid. *Churchill v. Marks*,

441

39. Legacies given by different instruments *held* under the circumstances of the case to be cumulative. *Lyon v. Colville*,

449

40. Testator gave certain fee-farm rents and stock in the funds to trustees, upon trust to pay the annual produce and dividends to his two nieces M. and N. for their lives and the life of the survivor; and after the decease of the survivor of them *unmarried*, to convey or transfer the rents and the stock to the children of B.; with a proviso, however, that if his nieces or either of them should marry, the trustees should have power to settle the share of the party marrying for her benefit and that of her husband and children; and that, in the event of a marriage and children of the marriage who should attain twenty-one, (*but not otherwise*), the limitations over in favour of B.'s children should be void. And the testator gave the residue of his property to M. and N. absolutely. M. and N. both married, but had no children, and their settlements provided, that, in the event of their having no children, the persons interested under the will should take:—*Held*, that the children of B. were entitled. *Doyle v. Cartwright*,

482

41. Testator gave certain real and personal property to trustees, upon trust to pay the annual income to his two nieces, in equal moieties, dur-

ing their lives, and, after the death of either of them *unmarried*, then upon trust to pay the whole income to the survivor during her life. Upon the death of one of the nieces who had *married*—*Held*, upon the construction of the entire will, that the survivor was entitled to the whole income for her life. *Doyle v. Cartwright*, 482

42. Testator gave all the residue of his real and personal estate unto and equally between and amongst all his relations who might claim and prove their relationship to him by *lineal descent*. He had no wife or issue at the time of making his will, nor afterwards. He died leaving several first cousins, his next of kin:—*Held*, that the first cousins were entitled to the residuary estate, both real and personal. *Craig v. Lamb*, 489

43. Testator gave the interest of £50,000 to his wife for life, and directed that after her death £10,000 should be set apart out of that sum in aid of his residuary estate; and he directed that the interest of the monies arising from the sale and conversion of his real and personal estate not specifically devised or bequeathed, and also of the £10,000, should be paid to A. for life. By a codicil the testator bequeathed to A. "the legacy or sum of £10,000, to be paid to him out of my residuary estate:—"*Held*, that the sum of £10,000 given by the codicil was distinct from the sum of £10,000 given by the will. *Forbes v. Lawrence*, 495

44. Testator, after bequeathing certain leaseholds for years to A., who died in the testator's lifetime, and after bequeathing several legacies, gave and bequeathed to trustees all his money in the Long Annuities, and other of the public stocks or funds, ready money and securities for money, outstanding debts, and all the rest, residue, and remainder of

his estate and effects whatsoever and wheresoever, upon trust, in the first place, by sale thereof, or of so much thereof as should be necessary for that purpose, to pay thereout all his debts and funeral and testamentary expenses and the legacies by him thereinbefore given, and subject thereto to pay the dividends and interest thereof to B. for life, and after B.'s decease to permit C. to have the dividends and interest for life; and after the decease of the survivor of B. and C., he bequeathed the principal of the said trust fund to the children of D.:—*Held*, that the tenants for life were not entitled to the enjoyment *in specie* of the rents of the leaseholds and the dividends of the stock, but that the leaseholds and stock must be invested so as to be permanently productive for the persons entitled to it, according to the limitations of the will. *Sutherland v. Cooke*, 498

45. Legacies held to be charged by the will of a testator upon his real estate in exoneration of his personalty. *Ashby v. Ashby*, 549

46. Testatrix gave the residue of her personal estate to twelve persons, or such of them as should be living at her decease. She then directed her real estate to be sold at a certain time, and gave the produce to the same twelve persons and three others, or such of them as should be then living. She then added a proviso, that the "share or proportion" of S., one of the twelve legatees, should be settled to her separate use for life:—*Held*, upon the construction of the whole will, that the proviso applied as well to S.'s share in the residue of the personalty, as to her share in the produce of the realty. *Cockrill v. Pitchforth*, 626

47. Will of realty, dated prior to the 1st January, 1838, and bearing upon the face of it certain obliterations which were favourable to the

claim of the heir-at-law of the testatrix, established against the heir, without the obliterations; the evidence leading to the conclusion, that the obliterations were not made previously to the execution of the will or under circumstances rendering them valid within the provisions of the 6th section of the Statute of Frauds; and the heir not desiring an issue. *Wynn v. Heveningham*, 630

48. Testator bequeathed the residue of his estate equally between his two sons and his daughter, with a direction, that, in case either of his sons should die under twenty-one, or in case his daughter should die unmarried, the share of the son or daughter so dying should go to his the testator's *two then surviving children*; and that, in case both sons should die under twenty-one, or one son die under that age, and the daughter die unmarried, the share of the second child so dying should go to the only surviving child; and, further, that, in case both the sons should die under twenty-one, and the daughter die unmarried, the residue should go over. The two sons attained twenty-one. The daughter survived them, and died unmarried:—*Held*, that there was an intestacy as to the daughter's share. *Cooper v. Palmer*, 665

49. A testator, possessed of personal property, gave a beneficial and apparently absolute interest in it to his wife, whom he made his sole executrix; but with a direction, that, in case his property should be more than she wanted to live on for her lifetime, she was to give weekly the remainder to the testator's two daughters, so long as she lived; and he directed the whole of his property to be sold, and the money to be put into the Bank of England, in trust as might be thought best for her and those in trust:—*Held*, that the wife took beneficially



